DOCKET

No. 07-1223	*** CAPITAL CASE ***
Title:	Edward Nathaniel Bell, Petitioner v. Loretta K. Kelly, Warden
Docketed:	March 26, 2008
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(06-22)
Decision Date:	January 4, 2008
Rehearing Denied:	January 29, 2008

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 25 2008	Petition for a writ of certiorari filed. (Response due April 25, 2008)
Mar 25 2008	Application (07A798) for stay of execution of sentence of death, submitted to The Chief Justice.
Mar 25 2008	Appendix of Edward Nathaniel Bell filed.
Mar 28 2008	Brief of respondent Loretta K. Kelly, Warden in opposition filed.
Apr 1 2008	Reply of petitioner Edward Nathaniel Bell filed.
Apr 9 2008	DISTRIBUTED for Conference of April 25, 2008.
May 5 2008	DISTRIBUTED for Conference of May 8, 2008.
May 12 2008	Petition GRANTED limited to Question 1 presented by the petition.
May 12 2008	Application (07A798) granted by The Chief Justice. The execution of sentence of death is stayed pending the sending down of the judgment of this Court.
May 23 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 31, 2008.
Jul 3 2008	The time to file respondent's brief on the merits is extended to and including September 29, 2008.
Jul 31 2008	Joint appendix filed. (Volume I and II)
Jul 31 2008	Brief of petitioner Edward Nathaniel Bell filed.
Aug 7 2008	Motion for leave to file amici brief filed by National Association of Federal Defenders, et al.
Aug 7 2008	Motion for leave to file amicus brief filed by Virginia Association of Criminal Defense Lawyers.
Aug 7 2008	Motion for leave to file amici brief filed by Former State Court Judges.
Aug 8 2008	CIRCULATED.
Aug 11 2008	Response from respondent to motion of VACDL for leave to file amicus brief filed. (Distributed).
Aug 11 2008	Response from respondent to motion of Former State Court Judges for

	leave to file amicus brief filed. (Distributed)
Aug 11 2008	Response of respondent to motion of NAFD and NACDL for leave to file amicus brief filed. (Distributed)
Aug 14 2008	Record received from the U.S.D.C. for the Western District of Virginia. (Roanoke) (5 (boxes) There are sealed documents in this record.
Aug 15 2008	Record received from U.S.C.A. for the 4th Circuit. (1 box) There are sealed documents in the record.
Aug 18 2008	SET FOR ARGUMENT ON Wednesday, November 12, 2008.
Sep 29 2008	Brief of respondent Loretta K. Kelly, Warden filed. (Distributed)
Oct 3 2008	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Oct 3 2008	Brief amici curiae of Idaho and 30 Other States filed. (Distributed)
Oct 6 2008	Brief amicus curiae of Virginia Association of Commonwealth's Attorneys filed. (Distributed)
Oct 14 2008	Motion for leave to file amici brief filed by Former State Court Judges GRANTED.
Oct 14 2008	Motion for leave to file amici brief filed by National Association of Federal Defenders, et al. GRANTED.
Oct 14 2008	Motion for leave to file amicus brief filed by Virginia Association of Criminal Defense Lawyers GRANTED.
Oct 29 2008	Reply of petitioner Edward Nathaniel Bell filed. (Distributed)
Nov 10 2008	Letter received from counsel for the respondent proposing a lodging of copies of a 2007 report by Vanderbilt University on various effects of AEDPA in the United States.
Nov 12 2008	Argued. For petitioner: Richard P. Bress, Washington, D.C. For respondent: Katherine Burnett, Senior Assistant Attorney General, Richmond, Va.
Nov 17 2008	Per Curiam. Writ of certiorari DISMISSED as improvidently granted.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

071223 MAR 25 2008

OFFICE OF THE CLERK

No. (1)

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,

PETITIONER,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Capital Case – Execution Scheduled for April 8, 2008

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. The questions presented are:

1. Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

2. Did the Fourth Circuit err when, in conflict with decisions of several courts of appeals and state supreme courts, it categorically discounted the weight of mitigating evidence for *Strickland* prejudice purposes whenever the evidence could also have aggravating aspects?

3. Does Virginia's use and/or manner of administration of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, as a method of execution by lethal injection, violate the Cruel and Unusual Punishment Clause?

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The unpublished decision of the United States Court of Appeals for the Fourth Circuit is reprinted at Pet. App. 1a.[1] Its order denying rehearing and rehearing en banc is reprinted at Pet. App. 178a. The published decision of the United States District Court for the Western District of Virginia is reported at *Bell v. True*, 413 F. Supp. 2d 657 (W.D. Va. 2006), and reprinted at Pet. App. 18a. The district court's oral ruling is unreported and reprinted at Pet. App. 168a. The order of the Fourth Circuit denying expansion of the Certificate of Appealability is reprinted at Pet. App. 177a.

JURISDICTION

The Fourth Circuit entered judgment on January 4, 2008. A timely petition for rehearing and rehearing en banc was denied on January 29, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix, Pet. App. 179a-80a, reproduces the text of the Sixth Amendment, U.S. Const. amend. VI; the Eighth Amendment, U.S. Const. amend. VIII; and the provisions of 28 U.S.C. § 2254 at issue in this case.

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[1] The Appendix filed with this Petition is cited as "Pet. App." The joint appendix filed with the Fourth Circuit is cited as "JA." The joint appendix filed with the Supreme Court of Virginia is cited as "State JA."

STATEMENT OF THE CASE

Petitioner Edward Bell was convicted and sentenced to death for the 1999 murder of Sergeant Ricky Lee Timbrook, a police officer. Pet. App. 181a-82a, 18a, 2a. The facts of the underlying crime were recounted by the Supreme Court of Virginia and reiterated by the district court and the Fourth Circuit, and can be found at Pet. App. 182a-88a, 19a-25a, and 2a-8a respectively. As the case comes to this Court, it primarily concerns the failure of Bell's appointed counsel to investigate evidence in mitigation. The district court found that Bell's counsel rendered performance that was below the constitutional minimum, under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 171a. The Fourth Circuit did not disagree. Yet the courts below found no prejudice and denied relief—even though trial counsel had presented *no* evidence in mitigation whatsoever.

Pre-Trial Proceedings

Bell's early defense team consisted of Lloyd Snook and Jud Fischel. Pet. App. 78a-79a. Fischel "blindly thought" that Snook, an experienced capital litigator, was preparing a mitigation case. Pet. App. 79a. Shortly before the first scheduled trial date, it became clear that Snook had done no investigation and developed "no mitigation evidence." *Id.* Snook withdrew, *id.*; *see also* JA 1811-12, and the court appointed Fischel's personal friend Mark Williams—who was "not on the list for capital defense attorneys and had never before handled a capital case." Pet. App. 79a; JA 1817-18. After interviewing Bell, his sisters, and his mother, Williams "concluded there was little evidence that would assist in mitigating

the case against Mr. Bell." Pet. App. 79a. Williams did not interview Bell's wife, girlfriends, or children, did not seek information about Bell's education, mental capacity, or employment, and did not investigate the prosecution's evidence in aggravation. Pet. App. 171a-73a.

The trial court authorized Bell's counsel to hire a fact investigator, a psychological expert under Virginia Code Ann. § 19.2-264.3:1 (commonly called a "3:1 expert"), and *two* mitigation specialists. JA 40-43, 1328; State JA 133. Williams, however, never deployed the fact investigator. JA 1234, 1969-70. Snook had retained a mitigation specialist, Marie Deans, but neither he nor Williams ever provided her the necessary paperwork or followed up with her. JA 41, 1170, 1419-20. Deans, a veteran of over 200 capital cases, would later testify that this case was "the most disorganized" one she had ever worked on. Pet. App. 80a; JA 1170, 1415. In her words, "it reached a level of absurdity, really." JA 1415.

Counsel did secure the appointment of a psychologist, Dr. William Stejskal. JA 1140, 1328. Williams "relied upon . . . Dr. Stejskal" to conduct the mitigation investigation, Pet. App. 173a, and neither directed Stejskal's work nor continued his own independent investigation. JA 1943, 1956-57.

Sentencing

Bell was convicted of capital murder on January 25, 2001. Pet. App. 27a. The next day, Bell's trial moved into the sentencing stage for which his counsel had failed to prepare. *Id.*

By law, Bell's jury could not return a death sentence unless it found, beyond a reasonable doubt,

at least one of two statutory aggravators: that the crime was "wantonly vile" or that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." *See* Va. Code Ann. § 19.2-264.2. The trial court ruled that the crime was not vile as a matter of law, leaving future dangerousness as the sole possible aggravator. *See* JA 142-44. Even if the jury found future dangerousness proven beyond a reasonable doubt, it was nevertheless free to return a life sentence in consideration of any mitigating evidence "which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." JA 68.

To demonstrate future dangerousness, the Commonwealth introduced evidence of alleged prior bad acts. Pet. App. 188a. For example, a police officer from Jamaica testified about Bell's arrest for "assault" when he was a youth. *Id.* Because Bell's counsel failed to prepare, however, the jury did not hear that the victim of the "assault" characterized the incident as a childish scuffle. JA 1454-56.

A police officer testified to stopping Bell and finding a handgun concealed in the trunk of the car he was driving. Pet. App. 188a. Another testified that Bell gave him a false name when stopped, and then ran away. *Id.* And a third testified that he found ammunition on Bell during a "stop and frisk." *Id.* A maintenance worker at the jail where Bell was confined testified that Bell had threatened to kill him for refusing to corroborate a report Bell filed. JA 170-71. And a corrections officer testified that Bell had told him to "see what happens" if Bell's handcuffs were removed. JA 173-75. The prosecutor

summarized this testimony as demonstrating that Bell's "actions towards uniformed official personnel . . . are violent." JA 266.

Because Bell's counsel did not uncover them, his jury did not hear the witnesses who could have contradicted that summary. Carmeta Albarus, Bell's post-conviction mitigation specialist, testified that she interviewed Bell's family and friends in Jamaica—who agreed Bell was not violent and who considered murder "totally out of character" for Bell. JA 1482; *see also* JA 1456. A former coworker of Bell's, Precious Henderson, testified before the district court that she never saw Bell "violent or fighting with anyone." JA 1543-44. Barbara Bell Williams, Bell's ex-wife, also noted that Bell had many friends who were police officers, including an "excellent" relationship with officers Steveroy Campbell and Angellita Hamilton, and performed community volunteer work through "police youth clubs." JA 1549-50; *see also* JA 1072, 1075.

Other prosecution witnesses alleged altercations with Bell. Billy Jo Swartz claimed that Bell slammed her head into his car and held a gun to her head. JA 202. Swartz testified that, during the same incident, Bell got into a physical fight with his then-pregnant girlfriend Tracy Nicholson. JA 204. Bell's counsel never learned that Nicholson's mother, Joanne, was present during the incident, JA 1519-20, 1533, and as the district court found, "would . . . have been available to rebut the testimony" of Swartz. Pet. App. 172a. In particular, Joanne would have testified the incident involved "no physical contact . . . just words exchanged," and that Bell did not strike either Swartz or Tracy. JA 1519-20. She

also could have described how Bell had a "good relationship" with Tracy, and was a "very caring father" to Tracy's children. JA 1518.

The prosecution also called Dawn Jones, another former girlfriend, who told the jury that Bell once came to her trailer with a gun, but did not "do anything with" it. JA 226. As the district court found, Jones was not effectively cross-examined "because [trial counsel] had not interviewed her." Pet. App. 171a. Bell's trial counsel also failed to elicit the positive testimony that Jones later gave before the district court on habeas, in which she described how Bell tended to her when she was sick and unable to work. JA 1491. Jones also could have testified that when their daughter Kydesha was born prematurely, Bell sat for days by her incubator praying for her survival. JA 1110, 1259, 1492-93.

Moreover, Bell's trial counsel did not discover, or inform the jury, that Bell was given drugs and alcohol as a toddler, "a form of child abuse" that likely caused him physical brain damage. JA 1131, 1188-89, 1445, 1563. Nor did they learn that Bell suffered physical abuse as a child. He was often "awaken[ed] in the middle of the night by blows to the head for some offense that occurred earlier in the day"—and he was regularly beaten "with electrical cords, belts, wood planks, and brooms" until his body bore lasting scars. JA 1195; *see also* JA 1341, 1445-46. In the opinion of multiple psychologists, Bell may be mildly retarded. JA 308, 342-44, 1227-31, 1349-50, 1746-47.

Finally, Sergeant Timbrook's family gave victim impact statements, including his widow's description of her son's life without his father. JA 229-47.

Because Bell's counsel failed to investigate, however, his jury did not learn that his family and children would be similarly devastated by his execution. While the district court was introduced to Bell's youngest children, Diontre, Xavian, and Eddie Junior, JA 1515, Bell's jury was not. The district court understood the introduction of Bell's children to be "very relevant." JA 1516. The district court learned that Bell "was more of a father to [Tracy's daughter Alyse] than her own father," even though he shared no blood kinship with her. JA 1518. Bell's jury did not. The district court learned that Bell's daughter Kydesha would be "devastated" if he were executed, while his daughter Kamille would "end up in a psychiatric ward." JA 1503, 1553-54. Bell's jury did not. When asked about the possibility of Bell's execution, Joanne Nicholson told the district court, "I don't know if I could handle it, but—(witness crying)—excuse me. I don't know. It's going to be hard because we just love him so much." JA 1524. The district court found that Ms. Nicholson "would have been a helpful mitigation witness." Pet. App. 172a.

The district also found that Barbara Bell Williams "would have testified that Bell was a loving, decent, and hard working person . . . and was otherwise a good father." Pet. App. 171a-72a. Williams was prepared to corroborate her testimony with letters Bell wrote and proof of money he paid to support his daughter Kamille. JA 1555-56. Other witnesses trial counsel missed would have testified that Bell worked hard, at menial jobs, in an attempt to support his family. Nicholson "worked with Eddy" at a manufacturing plant, and would have testified that "Eddy worked hard and he was well liked

there." JA 1262. Henderson also would have testified about Bell's work ethic. *See* JA 1540-41; Pet. App. 172a.

As the case comes to this Court, however, it is undisputed that Bell's trial counsel presented no mitigation evidence.[2] The only witnesses called by defense counsel at sentencing were Bell's sister and father, Pet. App. 189a, but, having not prepared, Bell's counsel elicited only harmful testimony from them. Bell's sister "testified not about the impact of Mr. Bell's execution, but . . . that her children were being beaten up, being harassed just for being related to Eddie." JA 1917; *see also* JA 251. Bell's father, Oswald, told the jury that if Bell was "guilty of the act" they should "punish him." JA 254. Oswald asked the court for an opportunity to plead for his son's life, but when asked to proffer what Oswald would say, trial counsel could not—having not interviewed him. *Id.* And when the court ruled that Oswald could only testify in response to a question, trial counsel could not think of anything to ask him. JA 254-55.

The prosecutor relied on the lack of mitigation evidence as an affirmative reason to sentence Bell to

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[2] *See* JA 2018 (district court finding that counsel "present[ed] no mitigating evidence, zero mitigating evidence. The prosecutor said it, you agree, I agree. The defense counsel presented zero"); *see also* JA 2005-06, 2008-09 (counsel for respondent agreeing); JA 264, 266, 276, 277 (trial prosecutor); JA 1180 (Dr. Mark Cunningham). Respondent's protest before the Fourth Circuit, that she agreed only that "there was no mitigating evidence in this case," is a distinction without a difference. *See* Brief of Respondent-Appellee at 25 n.1, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 13, 2007).

death—indeed, it became the centerpiece of his final argument to the jury. He contended multiple times that "there is no mitigation evidence in this case." JA 266; *see also* JA 264 ("This is not an individual . . . who has produced one shred of evidence of mitigation."), JA 276-77 ("The relationship that Edward Bell has to authority and law enforcement has absolutely not one shred of mitigation to it."). With no mitigating evidence to argue in closing, trial counsel instead maligned his client, conceding that "[t]he testimony that was offered was very graphic about a violent man. We didn't rebut it. Not try to defend it, refute it. We didn't." JA 269. Bell's counsel concluded by stating that both he and the prosecutor had "done [their] job[s]. Now, it is time for you to do yours." JA 274.

Bell's jury nevertheless struggled with the sentencing decision. The jury asked the court whether, if Bell were sentenced to life without parole, there would be "any other way to be released from prison." JA 290. The trial judge declined to answer. JA 290. One of Bell's jurors since has stated under oath that the jury was "looking for something mitigating, some reason not to sentence him to death, but . . . were given nothing by his lawyers." JA 1247. Ultimately, Bell's jury returned a death sentence. Pet. App. 27a.

Direct Appeal And State Habeas

On direct appeal, Bell argued, *inter alia*, that Virginia's lethal injection procedures were unconstitutional. The Supreme Court of Virginia held that ruling on this claim "would be an unnecessary adjudication of a constitutional issue" because Virginia permits capital defendants to

choose between lethal injection and electrocution. Pet. App. 221a.

On state habeas, Bell argued that he was denied the effective assistance of counsel because "counsel failed to investigate, identify or present available mitigating evidence for the penalty phase." Pet. App. 237a. The Supreme Court of Virginia denied Bell's requests for expert assistance, discovery, and an evidentiary hearing, and held that Bell satisfied neither prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 237a-39a, 261a. The court held that "counsel is not ineffective for failing to present evidence that could be 'cross-purpose evidence.'" Pet. App. 239a.

District Court Proceedings

Bell timely filed his petition for a writ of habeas corpus, raising multiple issues, including ineffective assistance of counsel at sentencing and a challenge to the constitutionality of Virginia's lethal injection procedures. Pet. App. 30a n.7, 31a-32a. On motion, the district court dismissed all of Bell's claims except for ineffective assistance of counsel. Pet. App. 167a. The district court rejected Bell's lethal injection claim, reasoning both that lethal injection is constitutional and that "[f]or Bell's lethal injection claim to be relevant, he would first have to choose it over electrocution, the constitutionality of which has been established by existing precedent. If he does so choose lethal injection, however, he waives his right to object to it." Pet. App. 165a (citation omitted).

With respect to Bell's ineffective assistance of counsel claim, the district court found that "Bell diligently developed the factual basis of" this "claim in state court," hence "an evidentiary hearing is not

barred by § 2254(e)(2)." Pet. App. 84a. Finding further that the "fact finding procedure employed by the state court was not adequate to afford a full and fair hearing," the district court ordered and conducted a two-day evidentiary hearing. Pet. App. 84a, 167a.

After hearing Bell's trial counsel testify live, and judging their credibility, the district court found their performance deficient within the meaning of *Strickland*. Pet. App. 171a. The district court found "as a matter of fact that it was unreasonable for Bell's counsel to depend upon Dr. Stejskal to do an investigation of the nature required." Pet. App. 174a. The court noted that, as evidenced by his report, Dr. Stejskal never indicated that he would undertake a full investigation of mitigating evidence. *Id.* Stejskal had informed trial counsel that it was *not* his role to conduct the mitigation investigation, JA 1379-80, and that neither he nor his staff were uncovering or developing mitigation evidence. Stejskal explained that "[t]he 3:1 expert is tasked with doing an evaluation of what would be a subset of [the] broader universe of mitigation evidence." JA 1329. Trial counsel could not have misunderstood Stejskal—having themselves previously advised courts that using a 3:1 expert as a mitigation investigator would be "ineffective assistance of counsel." JA 1854, 1872-76. And the district court rejected the suggestion that trial counsel made a strategic decision to omit investigation or presentation of mitigation evidence. The court concluded that because "much of the so-called double-edged sword evidence had already been presented in the state's . . . case," any fear

concerning the negative ramifications of the cross-purpose evidence was "unfounded." Pet. App. 174a.

The district court nonetheless held that "prejudice has not been shown" and denied relief, but *sua sponte* granted a Certificate of Appealability ("COA") on Bell's ineffective assistance of counsel claim. Pet. App. 175a. Bell moved for an expansion of the COA to cover the constitutionality of Virginia's lethal injection procedures. *See* Bell's Motion for Expansion of the Certificate of Appealability, *Bell v. Kelly*, No. 7:04CV00752 (W.D. Va. 2006). The district court denied Bell's motion.

Appellate Proceedings

Bell moved the Fourth Circuit for a similar expansion of his COA. *See* Motion to Expand Certificate of Appealability, *Bell v. Kelly*, No. 06-22 (4th Cir. 2007). But the Fourth Circuit also denied Bell's motion, Pet. App. 177a, and the case proceeded forward only on Bell's ineffective assistance of counsel claim.

After argument, the Fourth Circuit affirmed in a brief, unpublished opinion. Pet. App. 1a-17a. The Fourth Circuit did not disturb the district court's finding of deficient performance, and focused solely on *Strickland's* prejudice prong. Pet. App. 13a-14a. Bell argued that the prejudice issue should be reviewed *de novo*, and not under the deferential standard of 28 U.S.C. § 2254(d), because the state court's inadequate fact-finding procedures prevented it from receiving or ruling upon the mitigating evidence bearing on prejudice that was introduced for the first time on federal habeas. *See* Brief of Petitioner-Appellant at 37-38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007) ("Pet. Br."); Reply

Brief of Petitioner-Appellant at 23 n.9, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007) ("Pet. Reply"). The Fourth Circuit, however, applied § 2254(d) and reviewed only for whether the Supreme Court of Virginia's "determination was unreasonable—a substantially higher threshold" than mere error. Pet. App. 13a.

The Fourth Circuit found that the state court's determination was reasonable because the relevant evidence was "cross-purpose." Pet. App. 14a.[3] Specifically, the court held that, had counsel attempted to elicit testimony from Dawn Jones, she would have been forced to testify "that Bell physically assaulted her three or four times during their five-year relationship." Pet. App. 15a. But Jones *was* called by the prosecution at trial, and the prosecutor did not elicit that testimony. Moreover, Jones testified on federal habeas (and would have testified at sentencing, if asked) that none of these incidents resulted in injury or required legal assistance, *id.*, and that they did not fairly represent her relationship with Bell. JA 1499. The Fourth Circuit also noted that presenting Bell as a devoted father "would have allowed the prosecution to emphasize multiple instances of Bell's infidelity . . . and failure to provide child support." Pet. App. 16a-17a. But Bell's infidelity had already been the subject of Swartz's testimony. JA 202-03. And, if asked, Jones would have testified at sentencing that Bell "pa[id] child support" even without an order to

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[3] Despite this Court's repeated admonitions to consider the totality of available evidence, the Fourth Circuit confined its review to only "the evidence that the district court found would have been the most beneficial to Bell." Pet. App. 14a.

do so, JA 1507; Williams would have testified that he sent money and gifts to support his daughter in Jamaica, JA 1552-53; and Nicholson would have testified that Bell always made sure his children by Tracy had "their formula, their diapers, anything they needed." JA 1517. Finally, the Fourth Circuit noted that "focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook," whose wife was pregnant when he was killed. Pet. App. 17a. Mrs. Timbrook had, however, already invited precisely that comparison with her victim impact statement. JA 242-47.

Bell timely petitioned for rehearing and rehearing en banc. Petition for Rehearing & Petition for Rehearing En Banc, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Jan. 18, 2008) ("Rehearing Pet'n"). In his petition, Bell advised the court that its application of § 2254(d) to the prejudice aspect of his *Strickland* claim conflicted with decisions of the Ninth and Tenth Circuits. *Id.* at 3-5. Bell's petition was denied on January 29, 2008, Pet. App. 178a, and the Circuit Court of Winchester promptly scheduled his execution for April 8, 2008. Pet. App. 262a.

REASONS FOR GRANTING THE WRIT

The jury that sentenced Edward Bell to death heard hours of testimony in aggravation and no evidence at all in mitigation. The case comes to this Court with an undisturbed finding that the mitigation investigation conducted by Bell's trial attorneys was constitutionally deficient. The Fourth Circuit nevertheless found no prejudice, and denied relief, in reliance upon two erroneous rules of law.

First, the Fourth Circuit reviewed the prejudice aspect of Bell's *Strickland* claim under the highly deferential standard of 28 U.S.C. § 2254(d), pursuant to which habeas relief is denied unless the state court's decision is unreasonable. Section 2254(d) applies only to claims decided by a state court "on the merits," and the merits of the prejudice prong of a *Strickland* claim require an assessment of the *totality* of all available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Because the state court failed to provide adequate fact-finding procedures, Pet. App. 84a, 167a, the totality of mitigating evidence omitted in this case included evidence uncovered for the first time on federal habeas, which the state court never addressed. Pet. App. 13a. In nevertheless applying § 2254(d) to its review of the state court's decision, the Fourth Circuit chose sides in a mature circuit conflict recognized in *LeCroy v. Secretary, Department of Florida Corrections*, 421 F.3d 1237, 1262-63 (11th Cir. 2005), *cert. denied*, 546 U.S. 1219 (2006), and adopted a position contrary to the one this Court assumed when it reserved the question in *Holland v. Jackson*, 542 U.S. 649, 653 (2004).

Second, the Fourth Circuit dismissed the potential impact of the mitigation evidence Bell's trial lawyers had failed to uncover, for no reason other than the bare designation of that evidence as "cross-purpose"—meaning that a jury might also have found aspects of that evidence unflattering to Bell. Pet. App. 14a, 16a-17a. In so doing, the Fourth Circuit deepened another conflict—siding with the Fifth Circuit and the Supreme Courts of Virginia and Florida against the Third, Tenth, and Eleventh Circuits, and the Supreme Court of Georgia. The latter courts recognize that virtually *all* mitigating evidence will also have an aggravating aspect, and nonetheless give such evidence full weight in their prejudice analyses.

Independently, this Court at a minimum should hold Bell's case pending the resolution of *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007). By operation of Virginia law, Bell will be executed by lethal injection, using virtually the same cocktail of drugs under review in *Baze*. It would be a miscarriage of justice for Bell to be executed on April 8 by lethal injection while this Court's decision on the constitutionality of that method is imminent.

I. THE FOURTH CIRCUIT'S APPLICATION OF 28 U.S.C. § 2254(d) SHARPENS A SIX-CIRCUIT SPLIT OF AUTHORITY

The Fourth Circuit withheld habeas relief on Bell's *Strickland* claim because it concluded that the Supreme Court of Virginia's no-prejudice finding was not unreasonable within the meaning of 28 U.S.C. § 2254(d). But the opening clause of § 2254(d) limits that deferential standard to claims that have been

"adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d).

In the *Strickland* context, the merits of any prejudice decision are inextricably intertwined with the evidence properly before the court at the time. As *Strickland* itself held, a reviewing court "must consider the *totality* of the evidence before the judge or jury." 466 U.S. at 695 (emphasis added). In the capital sentencing context, that means "the *totality* of available mitigating evidence." *Wiggins*, 539 U.S. at 534 (emphasis added). Where a petitioner overcomes § 2254(e)(2)'s strict limitations and qualifies for an evidentiary hearing, and where the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing, new evidence properly may be adduced on federal habeas. At that point, the "totality" changes, such that no prior state court adjudication can be deemed to have been "on the merits" for § 2254(d) purposes.

The Ninth and Tenth Circuits so hold. In *Killian v. Poole*, the Ninth Circuit considered this issue in the analogous context of materiality under *Brady v. Maryland*, 373 U.S. 83 (1963)—holding that where "[e]vidence of . . . perjury" is "adduced only at" a federal hearing, "AEDPA deference does not apply . . . because the state courts could not have made a proper determination *on the merits*." 282 F.3d 1204, 1207-08 (9th Cir. 2002) (emphasis added), *cert. denied*, 537 U.S. 1179 (2003). Within a year of deciding *Killian*, the Ninth Circuit did what the Fourth Circuit has now refused to do: apply the

same rule to *Strickland* prejudice determinations.[4] *See Harris v. Terhune*, 92 Fed. Appx. 462, 463 (9th Cir. 2004) (citing *Killian* in context of *Strickland* claim, and holding that § 2254(d) deference applies only to "matters adjudicated on the merits" by the state court); *see also Brodit v. Cambra*, 350 F.3d 985, 993 (9th Cir. 2003) (same), *cert. denied*, 542 U.S. 925 (2004). Similarly, in *Cargle v. Mullin*, the Tenth Circuit held that, if a state court does not hear the evidence trial counsel failed to present, then "an adequate assessment of prejudice arising from the ineffectiveness of petitioner's counsel has never been made in the state courts," because *Strickland* requires courts to evaluate "all of counsel's deficient performance" collectively. 317 F.3d 1196, 1212 (10th Cir. 2003). In such circumstances, the Tenth Circuit holds, there is "no state decision to defer to under § 2254(d) on this issue." *Id.*; *see also Miller v. Champion*, 161 F.3d 1249, 1253-54 (10th Cir. 1998).

The Fifth, Sixth, and Seventh Circuits disagree. Those courts apply § 2254(d) even where new evidence relevant to a *Strickland* or *Brady* claim has surfaced for the first time on federal habeas. *See Johnson v. Luoma*, 425 F.3d 318, 324, 328 (6th Cir. 2005) (acknowledging but declining to follow *Killian*), *cert. denied*, 127 S. Ct. 58 (2006); *Pecoraro*

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[4] In *Kyles v. Whitley*, this Court confirmed that the *Brady* materiality standard, derived from *United States v. Agurs*, 427 U.S. 97 (1976), just like *Strickland*'s prejudice standard, requires that the effect of "suppressed evidence [be] considered collectively, *not item by item*." 514 U.S. 419, 436 (1995) (emphasis added); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (equating *Strickland* prejudice with *Brady* materiality).

v. Walls, 286 F.3d 439, 443 (7th Cir. 2002) (applying § 2254(d) to a *Brady* claim and noting that "evidence obtained in [an evidentiary] hearing is quite likely to bear on the reasonableness of the state courts' adjudication" but that this "should [not] alter the standard of federal review"); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004) (acknowledging but declining to follow *Miller*, and construing *Pecoraro* as making "clear . . . that § 2254(d) 'is applicable even though the district judge held an evidentiary hearing'"), *cert. denied*, 544 U.S. 1035 (2005); *Valdez v. Cockrell*, 274 F.3d 941, 951-53 (5th Cir. 2001) (acknowledging but declining to follow *Miller*, and holding over a dissent that § 2254(d) applies even where new evidence is adduced on federal habeas review because a case is adjudicated on the merits whenever "the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons"), *cert. denied*, 537 U.S. 883 (2002).

The Eleventh Circuit recognized this conflict in *LeCroy*, noting:

> Some courts have concluded that the fact that a district court holds an evidentiary hearing in accordance with AEDPA does not alter the federal standard of review; that is, courts are still required to apply the deference mandated in § 2254(d).
>
> * * *
>
> On the other hand, some courts have concluded, at least in certain instances, that AEDPA's requirement of deference

> to state court determinations is not applicable when the federal evidentiary hearing reveals new evidence that was not considered by the state court.

421 F.3d at 1262. The *LeCroy* court avoided this question by holding, on its facts, that relief would not be appropriate even under *de novo* review. *Id.* at 1263.

The Fourth Circuit has now charted a third course, agreeing with the Ninth and Tenth Circuits with respect to *Brady* materiality, yet siding with the Fifth, Sixth, and Seventh Circuits with respect to *Strickland* prejudice. In *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003), the Fourth Circuit held that "AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings." *Id.* at 297. In *Holland v. Jackson*, 542 U.S. 649, 653 (2004), this Court assumed without deciding that the rule of *Monroe* would also apply to *Strickland* prejudice analyses predicated on new evidence adduced on federal habeas in connection with *Strickland* claims. The Fourth Circuit here rejected that approach.

This case came to the Fourth Circuit (and comes to this Court) with an undisturbed district court finding that "Bell diligently developed the factual basis of this claim in state court" and "that 'the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing'" within the meaning of *Townsend v. Sain*, 372 U.S. 293 (1963). Pet. App. 84a. Bell therefore expressly asked the Fourth Circuit to follow the same

reasoning and extend *Monroe*'s rule to *Strickland* cases as well. Pet. Br. at 38; Pet. Reply at 23 n.9. The court declined. By strictly applying § 2254(d)'s unreasonable-application standard to a claim of prejudice heavily predicated on evidence newly received on federal habeas, it effectively limited *Monroe* to *Brady* cases only. Pet. App. 12a-13a. Bell raised this problem again as the first issue in his petition for rehearing en banc, Rehearing Pet'n at 3-5, but the Fourth Circuit denied rehearing. Pet. App. 178a. Fourth Circuit law now inexplicably provides that a § 2254 petitioner properly introducing new evidence to support a *Brady* claim will receive *de novo* review of the materiality issue, while a petitioner introducing new evidence to support a *Strickland* claim will find prejudice reviewed only for unreasonableness under § 2254(d).

This issue is one of recurring national importance. As *LeCroy* demonstrates, it arises often enough to give rise to a thoroughly developed split in the courts of appeals. Time will not sharpen this issue, nor further illuminate the question—it will merely deepen the growing gulf between the circuits. This Court already reserved decision on this question once. The time has come to resolve it.

II. THE FOURTH CIRCUIT'S HOLDING, THAT THE OMISSION OF EVIDENCE THAT COULD HAVE ANY AGGRAVATING ASPECT IS NOT PREJUDICIAL, DEEPENS A CONFLICT AMONG COURTS OF APPEALS AND STATE SUPREME COURTS

It is undisputed in this case that trial counsel presented literally *no* evidence whatsoever in mitigation. *See supra* note 2. The district court

found, as a fact, that Bell's trial counsel performed a woefully inadequate investigation, and held that their work fell below the constitutional minimum, qualifying as deficient performance within the meaning of *Strickland*. Pet. App. 171a. The Fourth Circuit did not disagree. Pet. App. 13a. As the case comes to this Court, therefore, the *only* question is whether counsel's failure to present any evidence in mitigation prejudiced Bell. The Fourth Circuit held that it did not, reasoning that a defendant is not prejudiced by counsel's failure to present mitigating evidence if a jury might also find something about that evidence unflattering or aggravating. Pet. App. 14a, 16a-17a. The Fourth Circuit is joined in this view by the Fifth Circuit and the Supreme Courts of Virginia and Florida—in sharp conflict with the Third, Tenth, and Eleventh Circuits, and the Supreme Court of Georgia. Review is warranted to resolve this conflict.

A. The Courts Below Are In Irreconcilable Conflict Regarding The Standard For Evaluating So-Called "Cross-Purpose" Evidence Under *Strickland*

As the Third Circuit has noted, it "is nearly always the case" that evidence in mitigation will open the door to some "harmful information." *Outten v. Kearney*, 464 F.3d 401, 422 (3d Cir. 2006). Nevertheless, some courts discount entire categories of mitigation evidence because they can imagine some downside to the evidence.

The Fourth Circuit adopted the rule that so-called "cross-purpose" evidence may be ignored in *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir. 1995), and has reaffirmed it unfailingly since. The

day before deciding *Bell*, the Fourth Circuit held that "mitigating evidence . . . should be discounted, *under our precedent*" if "double-edged." *Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir. 2008) (emphasis added). The Fourth Circuit applied that rule in Bell's case, disregarding every potential mitigating witness it considered merely by imagining some potentially negative aspect to their testimony. Pet. App. 13-15. And the Fourth Circuit continues categorically to disregard evidence that "could have been 'cross-purpose evidence capable of aggravation as well as mitigation.'" *Yarbrough v. Johnson*, No. 07-10, 2008 U.S. App. LEXIS 5645, at *28, *37 (4th Cir. Mar. 17, 2008) (citation omitted). Indeed, since this Court's decision in *Williams*, the Fourth Circuit has *never* found prejudice from a capital defense lawyer's failure to investigate and present available mitigating evidence—instead, it has repeatedly dismissed such claims by characterizing the omitted evidence as "cross-purpose" or "double-edged." Every time the Fourth Circuit has found evidence to be "cross-purpose" or "double-edged," it has found counsel not ineffective, and denied relief.

The Fifth Circuit similarly discounts all evidence, such as evidence of brain damage, that may be labeled "double-edged" or "cross-purpose." *See, e.g.*, *Faulder v. Johnson*, 81 F.3d 515, 519-20 (5th Cir. 1996). For example, in *Harris v. Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002), *cert. denied*, 540 U.S. 1218 (2004), the court dismissed evidence of prior childhood and prison experiences—categorically holding that "[t]he failure to present such double-edged evidence is not prejudicial." So does the Supreme Court of Virginia. *Lewis v. Warden*, 645 S.E.2d 492, 505-06 (Va. 2007)

(dismissing evidence of substance abuse for purposes of its prejudice analysis solely because such evidence is "double-edged"). And the Supreme Court of Florida holds that "an ineffective assistance claim does not arise from failure to present mitigation evidence where that evidence presents a double-edged sword." *Willacy v. State*, 967 So. 2d 131, 144 (Fla. 2007); *see also Evans v. State*, 946 So. 2d 1, 12-13 (Fla. 2006) (applying rule to disregard even evidence falling within Florida's mental health statutory mitigator).

The Eleventh, Third, and Tenth Circuits, on the other hand, explicitly give weight to all mitigating evidence, even where it might have some aggravating aspect. Had Bell been convicted in Winchester, Georgia, rather than Winchester, Virginia, his case would have been materially indistinguishable from, and controlled by, *Harris v. Dugger*, 874 F.2d 756, 763-64 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1989). Counsel in *Harris* failed to interview their client's friends and family, who could have testified that he was "a kind, decent man, a dependable employee, a family man, dedicated to his son, his niece and his ex-wife's other children." *Id.* at 760-61. Witnesses Bell's trial counsel failed to interview would have given indistinguishable testimony—that Bell was kind to them, "hard-working, loving, and a good father," dedicated to his children. Pet. App. 15a-16a. The state court in *Harris* found that the petitioner could not show prejudice because evidence of his good character would open the door to introduction of his numerous prior convictions and dishonorable military discharge. 874 F.2d at 762-63. The Eleventh Circuit, however, disagreed—emphasizing

that evidence of good character is vital to the particularized inquiry that juries must apply in death penalty cases, even though it will always carry with it other aspects of the defendant's human complexity and limitations. *Id.* at 764. The Eleventh Circuit observed that this type of evidence "constituted the only means of showing that [he] was less reprehensible than the facts of the murder indicated." *Id.* at 763-64; *see also Turpin v. Lipham*, 510 S.E.2d 32, 39, 42-43 (Ga. 1998) (finding prejudice from failure to introduce evidence of child abuse and mental disorders, even though trial counsel believed such evidence amounted to "a loaded gun" that would convince a jury the defendant was either "a poor institutionalized soul" or "an outright sociopath").

Had Bell been convicted in Delaware, his case would have been controlled by *Outten*, 464 F.3d at 422-23. In *Outten*, trial counsel failed adequately to investigate the defendant's background, and, as a result, did not present evidence of severe child abuse, neurological damage, low IQ, and substance abuse. *Id.* at 419-20. The court acknowledged that this evidence could be considered aggravating but noted that most of the aggravating aspects of it had already been introduced at sentencing in any event. *Id.* at 422. As the district court found, the same is true in Bell's case. *See* Pet. App. 174a (the "double-edged sword" aspect of Bell's evidence "was already before the jury"). The first witness whose positive testimony the Fourth Circuit discounted as "cross-purpose" was Dawn Jones—a witness who *already had been called* by the prosecution as a witness in aggravation. Pet. App. 15a n.6. While the Fourth Circuit emphasized that other witnesses would have

"allowed the prosecution to emphasize multiple instances of Bell's infidelity" or "domestic abuse," Pet. App. 16a-17a, Swartz already had testified that Bell was having an affair with her while his girlfriend was pregnant with his child and had accused Bell of assaulting both her and his then-pregnant girlfriend. JA 202-03. And while the Fourth Circuit pointed out that "focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook, whose death left behind a pregnant wife," Pet. App. 17a, multiple members of the Timbrook family already had invited the jury to make that very comparison through the vehicle of their victim impact statements. Pet. App. 188a. And, of course, as the Third Circuit noted, efforts to humanize a defendant by showing the jury his family and social connections will essentially *always* pose that risk. It "is nearly always the case" that omitted mitigation evidence can be characterized as "double-edged" or "cross-purpose" in nature. *Outten*, 464 F.3d at 422. Lest an exclusion of "cross-purpose" evidence defeat the principles this Court articulated in *Williams* and *Wiggins*, the Third Circuit found "the determination that [the defendant] could not establish prejudice because [his] records contained some harmful information" is unreasonable within the meaning of § 2254(d). *Id.*

Finally, had Bell been convicted in Winchester, Oklahoma, his case would have been controlled by *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004). Trial counsel in *Smith* failed to uncover and present evidence that the defendant was mentally retarded, had suffered brain damage affecting his ability to regulate emotions, and had been abused as a child.

Id. at 941-42. The district court in *Smith* reasoned the way the Fourth Circuit did in *Bell*, finding no prejudice because the omitted evidence could have led the jury to see the defendant as "an unstable individual with very little control over his impulses." *Id.* at 943. Indeed, *Smith* presented a far better case for the application of the Fourth Circuit's rule disregarding "cross-purpose" evidence: while there was *no* mitigation case presented in *Bell*, counsel in *Smith* had an affirmative mitigation strategy, with evidence that would have been directly undercut by introducing evidence of retardation, brain damage, and child abuse. *Id.* Nevertheless, the Tenth Circuit held that the district court's perfunctory dismissal of "double-edged" evidence "reveal[ed] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented." *Id.* Just as in Bell's case, the jury in *Smith* already had been shown the aggravating aspects of the omitted mitigation evidence. *Id.* at 943-44 & n.11. The Tenth Circuit reasoned that Smith was prejudiced because, without mitigating evidence, the jury was left with nothing but aggravation and no explanation for the defendant's conduct *Id.* In the Tenth Circuit's words, the petitioner was prejudiced by his counsel's failure to present "the mitigating 'edge.'" *Id.* at 943 & n.11.

B. But For Its Disregard Of Evidence With Aggravating Aspects, The Fourth Circuit Would Have Been Obliged To Find Prejudice

This Court's precedents make clear that consideration of mitigating evidence by the jury is essential to the "reliability" of a capital sentencing.

Penry v. Lynaugh, 492 U.S. 302, 328 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Mills v. Maryland*, 486 U.S. 367, 375 (1988). And prejudice is shown where trial counsel's errors deprive a defendant of a sentencing hearing "whose result is reliable." *Strickland*, 466 U.S. at 687. Bell's jury could only return a death sentence upon a unanimous verdict, and each individual juror was free to refuse the death penalty if he or she simply chose to grant mercy. *See* JA 65-68, 278-80. Under such circumstances, this Court's teachings dictate that prejudice must be found if there is "a reasonable probability that *at least one juror* would have" reached a different conclusion. *Wiggins*, 539 U.S. at 537 (emphasis added).

This Court has had no difficulty finding that standard met in cases where the potentially aggravating aspect of omitted mitigation evidence was significantly greater than in this case. *Williams*, *Wiggins*, and *Rompilla* all involved evidence that the Fourth Circuit would have disregarded as "cross-purpose" or "double-edged." In all three cases, the omitted evidence was of severely abusive and violent childhoods, often conjoined with drug and alcohol abuse. *See Rompilla v. Beard*, 545 U.S. 374, 381-86, 390-93 (2005); *Wiggins*, 539 U.S. at 534-36; *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *cf. supra* page 7 (similar evidence missed by Bell's counsel). Such evidence is significantly more "cross-purpose" than the evidence at issue in *Bell*—a jury either could view child abuse and drug use as mitigating (because it diminishes the defendant's "blameworthiness") or as aggravating (because it indicates a probability of future dangerousness). *See*

Penry, 492 U.S. at 324. Indeed, the Fourth Circuit withheld relief in *Wiggins* for precisely this reason, noting that "counsel is not ineffective for failing to introduce evidence that would have hurt as much as it helped," and finding that "the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness." *Wiggins v. Corcoran*, 288 F.3d 629, 642 (4th Cir. 2002), *rev'd sub nom. Wiggins v. Smith*, 539 U.S. 510 (2003); *see also Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). And in *Rompilla*, counsel's principal error was failing to investigate the prosecution's aggravating evidence—facts that, by definition, would be "cross-purpose" and therefore irrelevant under the Fourth Circuit's rule. 545 U.S. at 389-90. This Court, however, found that each defendant had demonstrated prejudice. *See Wiggins*, 539 U.S. at 534-35; *Williams*, 529 U.S. at 397-99.

The case for prejudice here is particularly strong for three reasons. First, the fact that counsel presented *no* evidence in mitigation itself effectively operated as an aggravating circumstance—inviting the jury to infer that Bell was so irredeemable that no one was willing to speak on his behalf. The prosecutor used the absence of mitigation evidence that way, reminding the jury of it six times. JA 264, 266, 276-77; *see also* JA 2008-09 (district court noting the significance the prosecutor attached to the absence of mitigating evidence). If the prosecutor, who watched the sentencing proceeding live and gauged the jury's reactions, thought the absence of mitigation evidence that significant, then the Fourth Circuit was not free to disregard it. Indeed, the district court received expert testimony

that the total lack of mitigation evidence was particularly damning. *See* JA 1980 (testimony of Dr. Mark Cunningham). Not only did trial counsel present no mitigation, they affirmatively undercut their client—calling harmful witnesses and characterizing their client to the jury as "a violent man." JA 269, 271; *see also* JA 2006 (district court finding that counsel's presentation "hurt Mr. Bell more than it helped him"); JA 1948-49. This Court previously has recognized the prejudicial impact of "an inadequate or harmful closing argument, when combined . . . with a failure to present mitigating evidence." *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993). The Fourth Circuit did not see as clearly.

Second, the mitigating evidence Bell's counsel neglected would have undercut powerfully the future dangerousness aggravator that was necessary to establish death eligibility. The Commonwealth characterized Bell as violent, but a host of witnesses could have shared with the jury their sense that this crime was entirely out of character for Bell. JA 1456, 1482, 1543, 1554, 1567. The Commonwealth specifically argued that Bell was a threat to law enforcement officials, but the jury never heard that Jamaican police officers believed Bell did not bear animosity towards law enforcement, nor did they hear of Bell's volunteer work with police youth clubs. JA 1456-57, 1536, 1549-50, 1567. The prosecution's star witness, Billy Jo Swartz, testified that Bell assaulted her. Had trial counsel prepared, they could have called the Nicholsons to testify that Swartz simply lied. JA 1244, 1262, 1519-20, 1533; Pet. App. 172a. The prosecution called a Jamaican police officer to testify to Bell's arrest for "assault." Having not prepared, trial counsel failed to call the

putative victim himself—who would have testified that the "assault" was simply a childish scuffle he barely recalled. JA 1454-56. Bell's jury was forbidden by their instructions from even considering a death sentence unless they unanimously found future dangerousness *beyond a reasonable doubt*—yet the Fourth Circuit found no prejudice from the failure to investigate and present mitigating evidence that directly negated the Commonwealth's future dangerousness case. Had they not categorically discounted "cross-purpose" evidence, the Fourth Circuit could not have reached that result.

Third, even if the jury still would have found future dangerousness, the mitigation evidence the district court received would have given the jury affirmative reasons to spare Bell's life. Bell's jury only heard Dawn Jones testify to the worst moment in her entire relationship with Bell. JA 1496-97. Instead of leaving the jury with an image of Bell entering her home with a gun, had trial counsel interviewed and examined her, Jones could have left the jury with the image of Bell kneeling by their daughter Kydesha's incubator, praying for her survival. JA 1110, 1259, 1492-93. After the Commonwealth presented the jury with the worst of Bell's bad acts, trial counsel missed the opportunity to have Barbara Williams tell them how Bell cared for her and their daughter Kamille, and how he worked as a volunteer with police youth groups to clean churches and minister to the sick and elderly. JA 1549. Bell's jury never learned how he worked twelve-hour shifts at a bottling plant to earn money to support Dawn Jones through her pregnancy and to support his children in Jamaica and America. JA

1262, 1491, 1517, 1540-41, 1552, 1555-56. Perhaps most critically, the jury never knew that a death sentence would negatively impact innocents—they never heard how Kamille and Kydesha "would be devastated" by Bell's execution, and they never heard Alyse, Diontre, Xavian, and Eddie Jr. ask them not to take away their father. JA 433, 444, 458, 1261, 1515-18. The district court received expert testimony that such evidence, depicting the defendant's redeeming qualities and attachments, is critically important to juries. JA 1247, 1291, 1317-18, 1405, 1431-32, 1488. Had the Fourth Circuit not categorically "discounted" evidence based on potential cross-purpose application, it could not have remained "'confiden[t]'" that not even "one juror" would have chosen to grant mercy and spare Bell's life. *Wiggins*, 539 U.S. at 534, 537 (citation omitted).

This Court has never required a capital defendant to prove he or she is of flawless moral character. Indeed, by the time a defendant reaches the *sentencing* stage of a capital proceeding, such a showing will always be impossible. Rather, this Court has consistently understood mitigating evidence to serve the function of completing the picture of a defendant's character—balancing the picture that the prosecution's aggravating evidence began, enabling the jury to "give a 'reasoned moral response'" to the crime. *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709 (2007) (citation omitted). Bell's jury was denied that opportunity.

C. This Issue Is Of National Importance And Ripe For Review

This Court need not, and should not, await further percolation of this issue in the courts below.

The split on this issue is deep and sharply defined. The Third, Tenth, and Eleventh Circuits, and the Supreme Court of Georgia, have followed this Court's teachings and give weight to evidence even where it might have some potential unflattering or even aggravating implication, while the Fourth and Fifth Circuits and the Supreme Courts of Virginia and Florida do not, as a matter of law. This issue has been amply developed. This Court should not delay its review, especially since each new decision risks the wrongful execution of a defendant who, under this Court's precedents, should not be executed.

III. THIS COURT SHOULD, AT A MINIMUM, HOLD THIS CASE PENDING THE RESOLUTION OF *BAZE V. REES*

This Court should, at a minimum, stay Bell's execution and hold this case pending decision in *Baze v. Rees* (U.S. Sept. 25, 2007) (No. 07-5439). Bell faces lethal injection using a drug cocktail nearly identical to that which Kentucky employs. *Compare Baze v. Rees*, 217 S.W.3d 207, 212 (Ky. 2006) (Kentucky uses three grams of sodium thiopental, fifty milligrams of pancuronium bromide, and 240 milligrams of potassium chloride) *with Walker v. Johnson*, 448 F. Supp. 2d 719, 720 (E.D. Va. 2006) ("Virginia uses three drugs in the lethal injection procedure . . . two grams of sodium thiopental . . . fifty milligrams of pancuronium bromide . . . [and] 240 milliequivalents of potassium chloride.").

Bell challenged lethal injection as a method of execution on state habeas, and the Supreme Court of Virginia denied relief, reasoning that electrocution is permissible under the Eighth Amendment and Bell

may choose electrocution over lethal injection pursuant to Va. Code Ann. § 53.1-234. Pet. App. 220a-21a. Bell raised the same claim on federal habeas, and the district court dismissed, reasoning in part that lethal injection on its face is a constitutional method of execution. Pet. App. 165a-66a. The district court also adopted the Supreme Court of Virginia's reasoning, expanding it into an inescapable Catch-22. According to the district court, Bell cannot have a ripe claim until he affirmatively chooses lethal injection, but by choosing, Bell forfeits his right to challenge the constitutionality of lethal injection. Pet. App. 165a.

Virginia law, however, provides a third path. Bell has refused to elect any method of execution "at least fifteen days prior to the scheduled execution." Va. Code Ann. § 53.1-234. Accordingly, absent the intervention of this Court, Bell will be executed by lethal injection by operation of law, not by virtue of his affirmative choice.

The Fourth Circuit denied a Certificate of Appealability, Pet. App. 177a, implicitly holding that no reasonable jurist could even debate the district court's reasoning. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). It also denied Bell's application for a stay of execution pending the decision in *Baze*. In *Baze*, this Court may find lethal injection protocols like that used in Virginia to be unconstitutional. It would be a miscarriage of justice for Bell to be executed on April 8 by a method the constitutionality of which remains unresolved. This Court should therefore, at a minimum, stay Bell's execution pending *Baze*, and then grant the petition, vacate

the decision of the Fourth Circuit, and remand for further proceedings not inconsistent with *Baze*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
FILED

07122 3 MAR 25 2008

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No. (16)

In the
Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Capital Case – Execution Scheduled for April 8, 2008

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-22

EDWARD NATHANIEL BELL

Petitioner – Appellant,

versus

LORETTA K. KELLY, Warden, Sussex I State Prison,

Respondent – Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke James P. Jones, Chief District Judge. (7:04-cv-00752-jpj)

Argued: October 30, 2007. Decided: January 4, 2008.

Before NIEMEYER, SHEDD, and DUNCAN, Circuit Judges.

Affirmed by unpublished opinion. Judge Shedd wrote the opinion, in which Judge Niemeyer and Judge Duncan joined.

ARGUED: Matthew K. Roskoski, LATHAM & WATKINS, L.L.P., Washington, D.C., for Appellant. Katherine P. Baldwin, Senior Assistant Attorney

General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** Katharine R. Saunders, LATHAM & WATKINS, L.L.P., Washington, D.C.; Robert Lee, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia; James G. Connell, III, Jonathan P. Sheldon, Randi R. Vickers, DEVINE, CONNELL & SHELDON, P.L.C., Fairfax, Virginia, for Appellant. Robert F. McDonnell, Attorney General, Jerry P. Slonaker, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

SHEDD, Circuit Judge:

A Virginia jury convicted Edward N. Bell of murdering Winchester police sergeant Ricky L. Timbrook, and he was sentenced to death. After unsuccessfully appealing his conviction and sentence in state court on direct review and in state habeas proceedings, Bell filed a petition in federal district court for a writ of habeas corpus. See 28 U.S.C. § 2254(d). The district court dismissed Bell's petition, and he now appeals, arguing that the district court erred in concluding that the dismissal by the state court of his ineffective assistance of counsel claim was reasonable. We affirm.

I.

In affirming Bell's conviction and sentence on direct appeal, the Supreme Court of Virginia found the following facts:

"On the evening of October 29, 1999, Sergeant Timbrook and two probation and parole officers were working together in a program known as Community Oriented Probation and Parole Services. One aspect of Sergeant Timbrook's responsibilities was to assist the probation officers in making home visits to individuals on probation or parole. On that particular evening, these three individuals were patrolling in an unmarked car in Winchester and were, among other things, searching for Gerrad Wiley, who was wanted for violating the terms of his probation.

"The officers went to Wiley's residence on Woodstock Lane in Winchester several times that evening to no avail. Just before midnight, when they returned to Wiley's residence for the sixth time, they saw an individual standing in a grassy area between a trash dumpster and an apartment building. As one of the probation officers and Sergeant Timbrook exited the vehicle and approached that individual, who was later identified as Daniel Charles Spitler, another person, who had 'dipped behind in the shadows,' began running away. Sergeant Timbrook pursued that individual while calling for assistance on his radio.

"Spitler identified the individual who ran from Sergeant Timbrook as Bell. Spitler testified that, on the evening in question, he was in the area of Woodstock Lane for the purpose of obtaining cocaine from Wiley. After no one answered his knock on the door of Wiley's residence, Spitler started walking down a nearby alley where he encountered Bell. Spitler did not tell Bell that he wanted cocaine, but, according to Spitler, Bell 'put his hands on [Spitler] like to pat [him] down to check and see if [Spitler]

had a wire on [him].' During that encounter, Sergeant Timbrook and the two probation officers arrived in the unmarked vehicle.

"When the vehicle's headlights illuminated Spitler and Bell, Spitler started walking toward the headlights, but Bell stepped into the shadows of a building. Spitler identified Sergeant Timbrook as one of the individuals who emerged from the vehicle. According to Spitler, Bell then started running away and Sergeant Timbrook chased after him, yelling 'We have one running. Stop.' Spitler lost sight of Bell and Sergeant Timbrook when they ran behind a building, but Spitler testified that he heard a shot soon thereafter.

"Sergeant Timbrook chased Bell along several streets and down an alley between two houses located at 301 and 303 Piccadilly Street. These houses were separated by a fence approximately two or three feet in height. As Sergeant Timbrook started to climb over the fence, a shot rang out. A police officer, Robert L. Bower, who had responded to Sergeant Timbrook's radio call for assistance, described the incident in this manner:

> [A]s [Sergeant Timbrook] started to cross over, I took my eyes off of him, and directed it toward the subject. I noticed it stopped. And, I saw a, what appeared to be a left shoulder as it stopped. All I could was ... it was like a black material.... As soon as I saw it stop, I looked back at [Sergeant] Timbrook to say something, at which time I heard the shot. And, I saw [Sergeant] Timbrook falling.

"Sergeant Timbrook's body was found lying on the ground with his feet close to the fence and his upper torso leaning against a wall. His gun was still in its holster. Sergeant Timbrook was transported to a local hospital where he was pronounced dead. The cause of death was a single gunshot wound above his right eye, caused by a bullet which was fired from a distance of between six and eighteen inches.

"Brad Triplett, one of the probation officers who had been patrolling with Sergeant Timbrook that evening, ran in a parallel direction during part of Sergeant Timbrook's pursuit of Bell. At one street intersection, he saw Sergeant Timbrook running after the 'same dark[ly] dressed figure' who had originally fled from Sergeant Timbrook. Triplett described that person's clothing as a 'dark black type of jumpsuit, nylon material,' with 'reflective like stripes on the jacket.' Several times during the pursuit, Triplett heard Sergeant Timbrook yelling, 'Stop running. Police.' He also heard the gunshot.

"The police searched the area for the suspect throughout the night by securing a perimeter around the neighborhood where the shooting had occurred and by using a helicopter equipped with a heat-sensitive 'Forward Looking Infrared' camera and a spotlight. At one point during the search, Officer Brian King spotted an individual lying on the back steps of a house located at 305 Piccadilly Street. King stated that the person was wearing a dark colored jacket with reflective strips on the sleeves that 'li[t] up like a Christmas [t]ree' when he shined his flashlight on the individual. The person then stood up and disappeared behind a bush.

"Emily Marlene Williams, who lived at 305 Piccadilly Street, testified that she heard the

gunshot on the evening in question and about five minutes later heard a 'crash' in the basement of her house. After she told the police about the noise in her basement, the police evacuated her and her family from their home. The following morning, the police discovered Bell, a Jamaican national, hiding in a coal bin in the basement of the Williams' residence. He was wearing a 'LUGZ' black nylon jacket and a black beret cap with a gold pin. The jacket had reflective stripes on the sleeves. Spitler identified both of these items of clothing as those that Bell had been wearing on the evening when Sergeant Timbrook was shot. Before Bell was transported from the Williams' residence to the police department, a gunshot residue test was administered to Bell's hands and the recovered particles were subsequently identified as gunshot primer residue.

"During a search of the backyard of the Williams' residence the day after Bell was apprehended, a deputy sheriff found a pearl-handled, Smith and Wesson .38 Special double action revolver. The gun was located under the edge of a porch on the Williams' house and was covered with leaves and twigs. Forensic testing established that this handgun fired the bullet that killed Sergeant Timbrook. Forensic testing of DNA that was recovered by swabbing the grips, butt, trigger, and trigger guard of this revolver could not eliminate Bell as a co-contributor of that DNA, which was consistent with a mixture of DNA from at least three individuals.

"When questioned by the police after his arrest, Bell admitted that he had been on Woodstock Lane when 'a white guy' allegedly began bothering him for

information. Bell said that when a car drove up and a man got out of the car, he 'was scared' and ran. He said he did not know who was chasing him or why, and that when he heard a shot fired, he hid in the basement of the house where he was later discovered. Bell denied having a gun. However, while Bell was confined in jail awaiting trial, he told another inmate that he shot Sergeant Timbrook, threw the gun underneath a porch, and then broke into a house and changed clothes in the basement.

"Justin William Jones testified that, around nine o'clock on the evening of the shooting, he saw Bell in the vicinity of Piccadilly Street. According to Jones, Bell showed him a revolver and asked if Jones knew of anyone who wanted to buy a weapon. Jones identified the pearl-handled, .38 caliber revolver introduced at trial as the same weapon that Bell had shown him.

"The evening Sergeant Timbrook was shot was not the first encounter between Timbrook and Bell. Sergeant Timbrook had arrested Bell for carrying a concealed weapon in May 1997. The following year, in September 1998, Sergeant Timbrook was present during the execution of an Immigration and Naturalization Service order to detain Bell. Eight months later, Sergeant Timbrook assisted in executing a search warrant at Bell's home. Bell was present during that search. In the summer of 1999, one of Bell's friends heard Bell state, as Sergeant Timbrook drove by in a vehicle, 'Somebody needs to bust a cap in his ass.' Another of Bell's acquaintances testified that she heard Bell say that he would like to see Sergeant Timbrook dead, and that if he ever came face to face with Sergeant Timbrook, he would shoot Sergeant Timbrook in the

head because he knew that Sergeant Timbrook wore a bullet-proof vest.

"During the penalty phase, the Commonwealth presented evidence regarding Bell's criminal history. Several law enforcement officers testified about incidents involving Bell. A police officer from Jamaica provided information about Bell's commission of the crimes of assault and destruction of property in 1985. In 1997, an officer with the Winchester Police Department found a .38 caliber handgun concealed in the trunk of a car being driven by Bell. The serial number of the gun had been filed off. An officer with the West Virginia State Police stated that when he stopped Bell for speeding in 1999, Bell gave him a false name. When the officer started to arrest Bell and place him in handcuffs, Bell ran away into a cornfield. Another West Virginia law enforcement officer found five .38 caliber rounds of ammunition on Bell's person during a 'stop and frisk' in 1999. Finally, two employees of the jail where Bell was confined while awaiting trial testified that Bell had threatened them.

"Another witness, Billy Jo Swartz, testified about an incident in 1997 when Bell grabbed her head and slammed it into his car. He also held a gun to her head. During the same incident, Bell got into a fight with his pregnant girlfriend and knocked her to the ground. Swartz further stated that she had seen Bell with illegal drugs. Other witnesses likewise testified about buying illegal drugs from Bell.

"Members of Sergeant Timbrook's family described their relationship with him and the effect that his death has had on the family. His wife was pregnant with their first child when Sergeant

Timbrook was killed. The only evidence that Bell introduced during the penalty phase was from his sister and father." Bell v. Commonwealth, 563 S.E.2d 695, 701-703 (Va. 2002), cert. denied, 537 U.S. 1123 (2003) (alterations in original) (footnote omitted).

II.

A grand jury in Winchester, Virginia, indicted Bell for capital murder, alleging that he deliberately, willfully, and with premeditation killed a police officer for the purpose of interfering with the performance of the officer's official duties. *See* Va. Code Ann. § 18.2-31(6). The jury found Bell guilty and he was sentenced to death based on the probability that he would commit criminal acts of violence in the future that would constitute a continuing serious threat to society. See Va. Code Ann. § 19.2-264.2. The Supreme Court of Virginia affirmed his conviction and sentence and denied his petition for rehearing. The United States Supreme Court subsequently denied his writ of certiorari. Bell thereafter filed a state petition for writ of habeas corpus asserting 21 claims, all of which the Supreme Court of Virginia dismissed in a 31-page opinion.

In the portion of the opinion denying Bell's claim that he received ineffective assistance of counsel, the Supreme Court of Virginia stated the following:

> The Court holds that claim (III)(a) satisfies neither the 'performance' nor the 'prejudice' prong of the two-part test enunciated in Strickland. The record, including the affidavit of counsel, demonstrates that after interviewing

petitioner, his sisters and his mother, counsel believed that there was little mitigation evidence available to assist petitioner. However, the transcript of the sentencing hearing establishes that counsel introduced evidence of petitioner's background and family life and such evidence was heard by the jury through petitioner's sister and father. Petitioner's sister testified that petitioner was one of fourteen children and that, except for one speeding incident in which she was involved after petitioner's arrest, no member of the family ever had legal problems. Petitioner's father testified that he started traveling to the United States in 1966 to do agricultural work and that, except for speeding violations; he also never had any legal troubles. While counsel did not introduce evidence of petitioner's drug and alcohol use, evidence that both petitioner's parents had multiple children with different partners, or evidence that petitioner supported five children borne of three different women, counsel is not ineffective for failing to present evidence that could be 'cross-purpose evidence' capable of aggravation and mitigation. Petitioner fails to proffer additional information that counsel should have discovered or presented during the penalty phase of petitioner's trial that would have assisted in mitigating his offense of capital murder. For example, there is not sufficient evidence in the record from a psychologist or a psychiatrist to show that petitioner's background and family life had

> an effect upon his development. Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigation evidence, the result of the proceeding would have been different. In finding no prejudice, the Court has weighed the evidence in aggravation against the mitigation evidence presented at the penalty phase of the trial and on habeas.

Bell v. True, No. 030539, slip op. at 8-9 (Va. April 29, 2004)(citations omitted).

The Supreme Court of Virginia denied Bell's motion for rehearing and his motion to amend his habeas petition. Bell then filed a federal habeas petition. The district court denied all of Bell's grounds for relief without a hearing, except for his claim that his trial counsel's failure to investigate or present mitigating evidence constituted ineffective assistance of counsel.

On this claim, the district court granted an evidentiary hearing on Bell's allegation that the decision of the Supreme Court of Virginia was an unreasonable determination of the facts in light of the evidence before it and an unreasonable application of precedent of the Supreme Court of the United States.[1] See § 2254(d). After its evidentiary

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[1] The district court granted Bell an evidentiary hearing because it appeared to the district court that the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing. See Townsend v. Sain, 372 U.S. 293, 313 (1963). Because we find that counsel's performance

hearing, the district court found that Bell received deficient performance from counsel and that the decision of the Supreme Court of Virginia to the contrary was unreasonable. See Wiggins v. Smith, 539 U.S. 510, 521 (2003). However, the district court also found that the decision of the Supreme Court of Virginia that counsel's performance did not prejudice Bell was reasonable.[2] See Strickland v. Washington, 466 U.S. 668, 694 (1984). The district court granted a certificate of appealability on the issue of whether counsel's investigation and presentation of mitigation evidence constituted ineffective assistance of counsel. This appeal followed.

III.

We review a district court's decision to grant or deny habeas relief de novo. See Williams v. Ozmint, 494 F.3d 478, 483 (4th Cir. 2007). A federal court may not grant habeas relief unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1) & (2). Under this standard, the federal court determines not whether "the state

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did not prejudice Bell, we need not decide whether the district court correctly granted an evidentiary hearing.

[2] The district court's written order granting an evidentiary hearing noted the deferential standard of review required by § 2254(d). J.A. 752-53. Although the district court's oral order dismissing Bell's petition did not explicitly apply this standard of review, we read the district court's oral order as consonant with its written order.

court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007) (citations omitted).

Bell claims that he received ineffective assistance of counsel and that the findings of the Supreme Court of Virginia to the contrary were unreasonable. To prevail on a claim of ineffective assistance of counsel, Bell must demonstrate (1) deficient performance, meaning that "counsel's representation fell below an objective standard of reasonableness" in light of "prevailing professional norms;" and (2) prejudice, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694.

On performance, Bell claims that counsel was deficient for failing to investigate and present available mitigating evidence from his ex-girlfriend, ex-wife, ex-wife's sister, ex-girlfriend's mother, and a co-worker.[3] See Wiggins, 539 U.S. at 522. He further claims that if counsel had presented such evidence, there is a reasonable probability that he would have received a life sentence. Id. at 534. Finally, Bell argues that the findings of the Supreme Court of Virginia to the contrary were unreasonable. See § 2254(d). We conclude that the district court

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[3] Bell also claims that the district court should have allowed him to present a report of witnesses from Jamaica, and should have appointed him two mental health experts. Ordinarily, we would review such rulings for abuse of discretion. See United States v. Forrest, 429 F.3d 73, 79 (4th Cir. 2005). However, since a certificate of appealability was never granted on these issues, we do not have jurisdiction to consider them. See Reid v. True, 349 F.3d 788, 795-98 (4th Cir. 2003).

correctly found that the finding of the Supreme Court of Virginia on prejudice was reasonable, and therefore Bell is not entitled to relief on his claim of ineffective assistance of counsel. Under these circumstances, it is unnecessary for us to address the district court's conclusion that the finding of the Supreme Court of Virginia that Bell did not receive deficient performance was unreasonable. See Strickland, 466 U.S. at 697-98.

In concluding that counsel's performance did not prejudice Bell, the Supreme Court of Virginia found that the evidence from Bell's witnesses constituted cross-purpose evidence, which is evidence capable of both aggravation and mitigation. See Barnes v. Thompson, 58 F.3d 971, 980 (4th Cir. 1995) (citations omitted). In making its prejudice determination, the Supreme Court of Virginia weighed this cross-purpose mitigation evidence against the evidence in aggravation. See Wiggins, 539 U.S. at 534.

At the district court's evidentiary hearing, Bell presented testimony from the five witnesses he claims should have testified for him during the penalty phase of the trial. After reviewing testimony from these witnesses, the district court concluded that the Supreme Court of Virginia was reasonable in finding that the absence of their testimony did not prejudice Bell because the evidence in aggravation outweighed the mitigation evidence presented at trial and on state and federal habeas.

In reviewing the district court's decision that the Supreme Court of Virginia was reasonable in finding no prejudice, we review the evidence that the district court found would have been the most beneficial to Bell had it been presented during the penalty phase

of Bell's trial. After its evidentiary hearing, the district court identified Dawn Jones, Barbara Bell Williams, Carol Baugh Anderson[4], and Joanne Nicholson as Bell's strongest witnesses.[5]

Ex-girlfriend Dawn Jones testified that Bell helped pay her bills when she was pregnant and was a good father to their child. However, Jones also testified that Bell physically assaulted her three or four times during their five-year relationship. While Jones was pregnant in 1993, Bell returned to Jamaica and married Barbara Williams, with whom he had previously fathered a child. Furthermore, after their relationship ended, Bell displayed a firearm during an argument with a man at Jones' house.[6] Finally, although Bell sent gifts to Jones, he never paid child support.

Ex-wife Barbara Williams testified that Bell was hard-working, loving, and a good father. However, she also testified that while she was pregnant in 1992, Bell left her and went to the United States. Bell never paid child support to Williams.

Prior to moving in with Williams, Bell lived in the same house with her sister, Carol Baugh

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[4] This witness is referred to as Carol Baugh Williams in the district court's oral order.

[5] Bell also presented testimony from his coworker, Precious Henderson, but the district court considered her testimony less helpful because she was unaware that Bell had been terminated from his job for substance abuse.

[6] Jones is the only one of the five witnesses to testify during the penalty phase of the trial. She testified for the prosecution regarding Bell's display of a firearm during this incident.

Anderson, for approximately eighteen months.[7] Anderson testified to the district court that Bell was hard-working, helpful around the house, and non-violent. However, Anderson's testimony allowed the prosecution to question her on Bell's relationship with her sister.

Joanne Nicholson is grandmother to the three children Bell fathered with his ex-girlfriend, Tracy Nicholson. Joanne testified to the district court that Bell was a good father and that she never saw him hit Tracy. However, her testimony was undermined by police reports showing that Bell assaulted Tracy. Joanne also testified that she saw the incident with Billy Jo Schwartz and stated that Bell did not have a gun and did not hit Tracy. However, Schwartz testified that Joanne was not present when Bell held a gun to Schwartz's head. Additionally, Joanne's account of the incident conflicts with both Schwartz's testimony and Tracy's affidavit.[8] Finally, her testimony allowed the prosecution to emphasize that Bell gave gifts, but did not provide child support to Tracy.

After review, we conclude that the district court correctly concluded that the finding of the Supreme Court of Virginia on prejudice was reasonable. Evidence from each of these witnesses was cross-purpose because it would have allowed the prosecution to emphasize multiple instances of Bell's

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[7] Carol Baugh Anderson testified to the district court that she and Bell lived in separate rooms and did not have a romantic relationship.

[8] Both Tracy and Schwartz state that during the incident Tracy was on top of Bell's car while it was moving. Joanne denied that Tracy was ever on top of Bell's car.

infidelity; abandonment of his children, wife and girlfriend; domestic abuse; and failure to provide child support. Furthermore, focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook, whose death left behind a pregnant wife. When weighed against the aggravating factors of Bell's criminal record and propensity for violence, we find it reasonable for the Supreme Court of Virginia to conclude that the factors in aggravation outweighed the mitigation evidence. Accordingly, we affirm the district court's decision denying Bell's petition for writ of habeas corpus.

AFFIRMED

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION.

Edward N. BELL, Petitioner,

v.

William Page TRUE, Warden, Sussex I State Prison, Respondent.

No. 7:04 CV 00752.

Feb. 7, 2006.

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413 F. Supp. 2d 657

OPINION AND ORDER

JONES, Chief Judge.

Edward N. Bell was convicted by a Virginia jury of the murder of Winchester police officer Ricky L. Timbrook and sentenced to death. After unsuccessfully challenging his conviction and the imposition of the death penalty both on direct appeal and in state habeas corpus proceedings, Bell now petitions for a writ of habeas corpus from this court.

Through his appointed attorneys, Bell raises a number of constitutional claims. Among other things, he contends that the state knowingly used perjured testimony against him and failed to disclose exculpatory evidence. He argues that one of his attorneys had a conflict of interest that adversely affected the defense. He also asserts that he is mentally retarded and thus cannot legally be executed.

After a very careful review of the record, I find that all of Bell's claims except one are without merit and should be dismissed. However, I will hold an evidentiary hearing on Bell's claim that his lawyers failed to present available mitigating evidence at the sentencing phase of the trial, leaving the jury with no alternative but to fix the death penalty in lieu of life imprisonment without parole. I make no decision on the claim at this point, but I find that Bell is entitled to an opportunity to prove his assertion at a hearing.[1]

While largely circumstantial, the evidence at trial that Bell murdered police officer Timbrook was very strong, and I am convinced that none of the errors Bell complains of affected the fundamental fairness of his conviction. Nevertheless, at this point, I cannot say that the jury's decision to sentence Bell to death was not unaffected by the alleged errors of his attorneys.

The full reasons for my decisions in this case follow.

I. FACTS.

In affirming Bell's conviction and sentence on direct appeal, the Supreme Court of Virginia summarized the facts in the light most favorable to the prosecution as follows:

> On the evening of October 29, 1999, Sergeant Timbrook and two probation and parole officers were working together in a program known as Community Oriented Probation and Parole Services. One aspect of

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[1] For a full discussion of this claim, see pages 696–699, below.

Sergeant Timbrook's responsibilities was to assist the probation officers in making home visits to individuals on probation or parole. On that particular evening, these three individuals were patrolling in an unmarked car in Winchester and were, among other things, searching for Gerrad Wiley, who was wanted for violating the terms of his probation.

The officers went to Wiley's residence on Woodstock Lane in Winchester several times that evening to no avail. Just before midnight, when they returned to Wiley's residence for the sixth time, they saw an individual standing in a grassy area between a trash dumpster and an apartment building. As one of the probation officers and Sergeant Timbrook exited the vehicle and approached that individual, who was later identified as Daniel Charles Spitler, another person, who had "dipped behind in the shadows," began running away. Sergeant Timbrook pursued that individual while calling for assistance on his radio.

Spitler identified the individual who ran from Sergeant Timbrook as Bell. Spitler testified that, on the evening in question, he was in the area of Woodstock Lane for the purpose of obtaining cocaine from Wiley. After no one answered his knock on the door of Wiley's residence, Spitler started walking down a nearby alley where he encountered Bell. Spitler did not tell Bell that he wanted cocaine, but, according to Spitler, Bell "put his hands on [Spitler] like to pat [him] down

to check and see if [Spitler] had a wire on [him]." During that encounter, Sergeant Timbrook and the two probation officers arrived in the unmarked vehicle.

When the vehicle's headlights illuminated Spitler and Bell, Spitler started walking toward the headlights, but Bell stepped into the shadows of a building. Spitler identified Sergeant Timbrook as one of the individuals who emerged from the vehicle. According to Spitler, Bell then started running away and Sergeant Timbrook chased after him, yelling "We have one running. Stop." Spitler lost sight of Bell and Sergeant Timbrook when they ran behind a building, but Spitler testified that he heard a shot soon thereafter.

Sergeant Timbrook chased Bell along several streets and down an alley between two houses located at 301 and 303 Piccadilly Street. These houses were separated by a fence approximately two or three feet in height. As Sergeant Timbrook started to climb over the fence, a shot rang out. A police officer, Robert L. Bower, who had responded to Sergeant Timbrook's radio call for assistance, described the incident in this manner:

> [A]s [Sergeant Timbrook] started to cross over, I took my eyes off of him, and directed it toward the subject. I noticed it stopped. And, I saw a, what appeared to be a left shoulder as it stopped. All I could was ... it was like a black material.... As soon as I saw it stop, I

> looked back at [Sergeant] Timbrook to say something, at which time I heard the shot. And, I saw [Sergeant] Timbrook falling.

Sergeant Timbrook's body was found lying on the ground with his feet close to the fence and his upper torso leaning against a wall. His gun was still in its holster. Sergeant Timbrook was transported to a local hospital where he was pronounced dead. The cause of death was a single gunshot wound above his right eye, caused by a bullet which was fired from a distance of between six and eighteen inches.

Brad Triplett, one of the probation officers who had been patrolling with Sergeant Timbrook that evening, ran in a parallel direction during part of Sergeant Timbrook's pursuit of Bell. At one street intersection, he saw Sergeant Timbrook running after the "same dark[ly] dressed figure" who had originally fled from Sergeant Timbrook. Triplett described that person's clothing as a "dark black type of jumpsuit, nylon material," with "reflective like stripes on the jacket." Several times during the pursuit, Triplett heard Sergeant Timbrook yelling, "Stop running. Police." He also heard the gunshot.

The police searched the area for the suspect throughout the night by securing a perimeter around the neighborhood where the shooting had occurred and by using a helicopter equipped with a heat-sensitive "Forward Looking Infrared" camera and a

spotlight. At one point during the search, Officer Brian King spotted an individual lying on the back steps of a house located at 305 Piccadilly Street.[n2] King stated that the person was wearing a dark colored jacket with reflective strips on the sleeves that "li[t] up like a Christmas [t]ree" when he shined his flashlight on the individual. The person then stood up and disappeared behind a bush.

[n2] The shooting occurred in the area between 301 and 303 Piccadilly Street.

Emily Marlene Williams, who lived at 305 Piccadilly Street, testified that she heard the gunshot on the evening in question and about five minutes later heard a "crash" in the basement of her house. After she told the police about the noise in her basement, the police evacuated her and her family from their home. The following morning, the police discovered Bell, a Jamaican national, hiding in a coal bin in the basement of the Williams' residence. He was wearing a "LUGZ" black nylon jacket and a black beret cap with a gold pin. The jacket had reflective stripes on the sleeves. Spitler identified both of these items of clothing as those that Bell had been wearing on the evening when Sergeant Timbrook was shot. Before Bell was transported from the Williams' residence to the police department, a gunshot residue test was administered to Bell's hands and the recovered particles were subsequently identified as gunshot primer residue. During a search of the backyard of the Williams' residence the day after Bell

was apprehended, a deputy sheriff found a pearl-handled, Smith and Wesson .38 Special double action revolver. The gun was located under the edge of a porch on the Williams' house and was covered with leaves and twigs. Forensic testing established that this handgun fired the bullet that killed Sergeant Timbrook. Forensic testing of DNA that was recovered by swabbing the grips, butt, trigger, and trigger guard of this revolver could not eliminate Bell as a co-contributor of that DNA, which was consistent with a mixture of DNA from at least three individuals.

When questioned by the police after his arrest, Bell admitted that he had been on Woodstock Lane when "a white guy" allegedly began bothering him for information. Bell said that when a car drove up and a man got out of the car, he "was scared" and ran. He said he did not know who was chasing him or why, and that when he heard a shot fired, he hid in the basement of the house where he was later discovered. Bell denied having a gun. However, while Bell was confined in jail awaiting trial, he told another inmate that he shot Sergeant Timbrook, threw the gun underneath a porch, and then broke into a house and changed clothes in the basement.

Justin William Jones testified that, around nine o'clock on the evening of the shooting, he saw Bell in the vicinity of Piccadilly Street. According to Jones, Bell showed him a revolver and asked if Jones

knew of anyone who wanted to buy a weapon. Jones identified the pearl-handled, .38 caliber revolver introduced at trial as the same weapon that Bell had shown him.

The evening Sergeant Timbrook was shot was not the first encounter between Timbrook and Bell. Sergeant Timbrook had arrested Bell for carrying a concealed weapon in May 1997. The following year, in September 1998, Sergeant Timbrook was present during the execution of an Immigration and Naturalization Service order to detain Bell. Eight months later, Sergeant Timbrook assisted in executing a search warrant at Bell's home. Bell was present during that search. In the summer of 1999, one of Bell's friends heard Bell state, as Sergeant Timbrook drove by in a vehicle, "Somebody needs to bust a cap in his ass." Another of Bell's acquaintances testified that she heard Bell say that he would like to see Sergeant Timbrook dead, and that if he ever came face to face with Sergeant Timbrook, he would shoot Sergeant Timbrook in the head because he knew that Sergeant Timbrook wore a bullet-proof vest.

Bell v. Commonwealth, 264 Va. 172, 563 S.E.2d 695, 701–703 (2002) ("*Bell I*").

During the penalty phase of the trial, the state presented the following evidence on Bell's criminal history, Bell's propensity for violence, and the effect of Sergeant Timbrook's death on Timbrook's family:

A police officer from Jamaica provided information about Bell's commission of the crimes of assault and destruction of property

in 1985. In 1997, an officer with the Winchester Police Department found a .38 caliber handgun concealed in the trunk of a car being driven by Bell. The serial number of the gun had been filed off. An officer with the West Virginia State Police stated that when he stopped Bell for speeding in 1999, Bell gave him a false name. When the officer started to arrest Bell and place him in handcuffs, Bell ran away into a cornfield. Another West Virginia law enforcement officer found five .38 caliber rounds of ammunition on Bell's person during a "stop and frisk" in 1999. Finally, two employees of the jail where Bell was confined while awaiting trial testified that Bell had threatened them.

Another witness, Billy Jo Swartz, testified about an incident in 1997 when Bell grabbed her head and slammed it into his car. He also held a gun to her head. During the same incident, Bell got into a fight with his pregnant girlfriend and knocked her to the ground. Swartz further stated that she had seen Bell with illegal drugs. Other witnesses likewise testified about buying illegal drugs from Bell.

Members of Sergeant Timbrook's family described their relationship with him and the effect that his death has had on the family. His wife was pregnant with their first child when Sergeant Timbrook was killed. The only evidence that Bell introduced during the penalty phase was from his sister and father.

Id. at 703.

II. PROCEDURAL HISTORY.

A. STATE PROCEEDINGS.

On January 11, 2000, a grand jury in the City of Winchester, Virginia, indicted Bell for capital murder, alleging that on October 29, 1999, Bell deliberately, willfully, and with premeditation killed a police officer for the purpose of interfering with the performance of the officer's official duties, in violation of section 18.2-31(6) of the Code of Virginia.[2] *See* Va.Code Ann. § 18.2-31(6) (Michie 2004). Counsel was appointed for Bell and he was tried by a jury in the Circuit Court of the City of Winchester.[3] The jury found Bell guilty of capital murder on January 25, 2001, and, on January 26, 2001, fixed his punishment at death. The jury based the death sentence on its finding that there was a probability that Bell would commit criminal acts of violence in the future that would constitute a

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[2] The grand jury also indicted Bell for three other crimes relating to the incidents on October 29, alleging that he used a firearm during the commission of a murder, in violation of section 18.2-53.1; possessed cocaine while simultaneously, knowingly, and intentionally possessing a firearm in violation of section 18.2-308.4; and possessed cocaine with the intent to distribute, in violation of section 18.2-248. *See* Va.Code Ann. §§ 18.2-31(6), -53.1, -248, -308.4 (Michie 2004 & Supp. 2005).

[3] Bell was also convicted for the use of a firearm, possession of a firearm while in possession of cocaine, and possession of cocaine with intent to distribute. The jury sentenced Bell to imprisonment for terms of three years, five years, and forty years respectively for these convictions, but the trial court reduced the jury's sentence for possession of cocaine with intent to distribute to ten years. Bell did not challenge any of these convictions or sentences on appeal.

continuing serious threat to society. *See* Va.Code Ann. § 19.2-264.2 (Michie 2004). The trial court entered a final judgment on June 12, 2001, sentencing Bell to death in accordance with the jury's verdict.

Bell appealed to the Supreme Court of Virginia from his capital murder conviction and sentence of death.[4] Bell presented twenty-eight assignments of error, but the court considered eleven of those assignments of error waived for failure to brief them on appeal. *Bell I*, 563 S.E.2d at 703. The court unanimously affirmed the conviction and sentence on June 7, 2002. *Id.* at 719. Bell filed a petition for rehearing on July 3, 2002, which the court denied on July 30, 2002. Thereafter, Bell sought a writ of certiorari from the United States Supreme Court, which was denied on January 13, 2003. *Bell v. Virginia*, 537 U.S. 1123, 123 S.Ct. 860, 154 L.Ed.2d 805 (2003).

Post-conviction counsel was appointed, and Bell filed his initial petition for a writ of habeas corpus with the Supreme Court of Virginia on March 14, 2003.[5] This initial petition was ninety-five pages

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[4] A sentence of death is subject to mandatory review by the Supreme Court of Virginia, in addition to consideration of any specific errors asserted on appeal. *See* Va.Code Ann. § 17.1-313 (Michie 2003).

[5] In death cases, the Supreme Court of Virginia has exclusive habeas corpus jurisdiction, although the court may refer specific issues to the trial court to conduct an evidentiary hearing and make findings of fact and recommended conclusions of law. *See* Va.Code Ann. § 8.01-654(C)(1)–(3) (Michie Supp. 2005). Where, as here, the petitioner claims to be mentally retarded, the Supreme Court of Virginia is directed to remand the case to the trial court to make that

long, and the court denied Bell's accompanying motion to exceed the fifty-page limit established by its rules. Bell filed a corrected petition on April 21, 2003, conforming to the page limitation. This corrected petition asserted fourteen claims and requested expert assistance, discovery, and an evidentiary hearing.[6] The state filed a motion to

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determination, if the claim of mental retardation is not frivolous. *See* Va.Code Ann. § 8.01-654.2 (Michie Supp. 2005).

[6] Bell's corrected state habeas petition asserts that:

I. The prosecution violated Bell's due process rights when they failed to disclose exculpatory evidence and knowingly provided false testimony.

II. Mr. Bell is mentally retarded.

III. Trial counsel failed to investigate, identify, or present available mitigating evidence for the penalty phase of Mr. Bell's trial.

IV. Trial counsel was ineffective for failing to object to verdict forms that did not comport with the trial court's instructions, Virginia law, or federal constitutional requirements.

V. Mr. Bell's rights to trial by jury were violated.

VI. Mr. Bell was not present at significant portions of his trial.

VII. The trial court shackled Mr. Bell without any finding of need.

VIII. The indictment failed to state a death eligible capital offense by not including specific aggravating factors.

IX. The aggravating factor of future dangerousness is unconstitutional because it is vague and the statutory scheme does not require that it be found beyond a reasonable doubt.

X. The jury selection process denied Mr. Bell the right to a trial by a jury selected in a non-discriminatory manner and from a fair cross-section of the community.

XI. New studies indicate that the death penalty as applied in Virginia is unconstitutional.

dismiss Bell's petition on May 21, 2003. On January 9, 2004, Bell filed a supplement to his petition that alleged seven additional claims and presented eight new exhibits. In a lengthy opinion, the Supreme Court of Virginia denied Bell's supplement and request for expert assistance and granted the state's motion to dismiss Bell's habeas petition. *Bell v. True*, No. 030539, slip op. at 30–31 (Va. April 29, 2004) ("*Bell II*").

Bell filed a petition for rehearing on May 28, 2004, and filed a motion to amend his habeas petition on August 18, 2004. The Supreme Court of Virginia denied the motion to amend on September 2, 2004, and denied the petition for rehearing on November 17, 2004. The Winchester Circuit Court then scheduled Bell's execution for January 7, 2005.

B. FEDERAL PROCEEDINGS.

On December 22, 2004, Bell filed a motion in this court to stay his scheduled execution, a notice of intent to file a petition for a writ of habeas corpus pursuant to 28 U.S.C.A. § 2254 (West 1994 & Supp. 2004), and a motion to appoint counsel. This court stayed Bell's execution pending consideration of his federal habeas petition and appointed counsel. In an amended habeas petition filed June 13, 2005,[7] Bell

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XII. Pretrial publicity was so pervasive that venue should have been changed.

XIII. Mr. Bell did not receive consular notification as required by the Vienna Convention.

XIV. Trial and appellate counsel were ineffective.

(Corrected State Pet. For Writ of Habeas Corpus (capitalization altered).)

[7] Bell initially contended that he should not be required to file his habeas petition until August 11, 2005, basing this

sets forth the following twelve grounds for federal habeas relief:

> I. The prosecution knowingly elicited false testimony from witnesses in violation of *Napue v. Illinois*, and failed to disclose exculpatory evidence in violation of *Brady v. Maryland*;
>
> II. Bell's attorney had an actual conflict of interest which adversely affected his performance, violating Bell's right to be represented by counsel with undivided loyalties;
>
> III. Bell is mentally retarded, prohibiting his execution;
>
> IV. Bell's trial counsel's representation fell below the objective standard of reasonableness and prejudiced his defense;
>
> V. The jury's assessment of future dangerousness violated Bell's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments;

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argument on the one-year period of limitations established by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). I rejected this contention, but did allow him additional time to prepare and file the petition. *See Bell v. True*, 356 F.Supp.2d 613, 614–616 (W.D.Va.2005), *reconsideration denied*, 366 F.Supp.2d 403, 409 (W.D.Va.2005), mandamus denied sub nom. *In re Bell*, No. 05-9 (4th Cir. May 16, 2005). Bell timely filed his petition on May 17, 2005. On June 13, 2005, prior to the respondent's answer, he filed an amended petition. The state objected to the amended petition, but I allowed it. *See Bell v. True*, 373 F.Supp.2d 613, 614–15 (W.D.Va.2005).

VI. Bell's rights to trial by jury were systematically violated;

VII. The trial court violated Bell's right to be present at his own trial;

VIII Bell was shackled in view of the jury, depriving him of the presumption of innocence;

IX. Bell was deprived of his right under the Vienna Convention on Consulate Relations to be notified of his right to communicate with the Jamaican Consulate;

X. Defects in Virginia's DNA testing procedures entitle Bell to habeas relief;

XI. Virginia administers the death penalty in an unconstitutionally random and arbitrary manner;

XII. Virginia's execution procedures violate Bell's Eighth and Fourteenth Amendment rights.

(Pet. at 44-236).

The state has filed an answer and motion to dismiss.[8] The motion to dismiss has been extensively briefed by the parties and oral argument was held on September 21, 2005. Accordingly, the motion to dismiss is now ripe for decision.

III. ANALYSIS.

In his federal habeas petition, Bell presents twelve claims for relief. In analyzing each of these claims, I must first consider whether the claim is procedurally defaulted. A claim is procedurally

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[8] For convenience, throughout this opinion I will refer to the prosecution and the respondent warden as "the state."

defaulted if: (1) the state court relied on an adequate and independent state procedural rule to deny relief on that claim, *Fisher v. Angelone*, 163 F.3d 835, 844 (4th Cir.1998); or (2) the petitioner failed to present a claim to the state court and that claim may not now be presented, *Gray v. Netherland*, 518 U.S. 152, 161–62, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *Bassette v. Thompson*, 915 F.2d 932, 936 (4th Cir. 1990). If a claim is procedurally defaulted, then petitioner must fail on that claim unless he can show that cause and prejudice or a fundamental miscarriage of justice might excuse his default. *Fisher v. Angelone*, 163 F.3d at 844.

If a claim was adjudicated in the state court on the merits, it is not procedurally defaulted and I must review the state court's decision on the merits. When reviewing such claims, the AEDPA provides that a federal court may grant habeas relief only if the state court's adjudication resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C.A. § 2254(d)(1), (2).

A state court adjudication is "contrary to" clearly established federal law only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision involves an

"unreasonable application" of clearly established federal law if the court identifies the correct governing legal principle, but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1495. "It is not enough that a federal habeas court, in its 'independent review of the legal question' is left with a 'firm conviction' that the state court was 'erroneous'... . [r]ather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75–76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (quoting *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 753 (9th Cir. 2001), *overruled on other grounds*, *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)).

A state court's factual determination is entitled to a "presumption of correctness." 28 U.S.C.A. § 2254(e)(1). That presumption is rebutted only by "clear and convincing" evidence that the state court decision was "based on [an] unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Id.*; 28 U.S.C.A. § 2254(d)(2); *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The presumption applies equally to the factual findings of state courts that conducted post-conviction proceedings. Howard v. Moore, 131 F.3d 399, 422 (4th Cir. 1997) (citing *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (per curiam), and *Johnson v. Maryland*, 915 F.2d 892, 896 (4th Cir. 1990)).

Even if a writ of habeas corpus is authorized under § 2254(d), a petitioner still is not entitled to relief unless he can show that any constitutional error committed had a substantial and injurious

effect or influence on the jury's verdict. *Wilson v. Ozmint*, 352 F.3d 847, 855 (4th Cir.2003) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and *Fullwood v. Lee*, 290 F.3d 663, 679 (4th Cir.2002) (applying Brecht after enactment of the AEDPA)).

With these principles in mind, I will address each of petitioner's claims in turn.

A. CLAIM I—*NAPUE* AND *BRADY* VIOLATIONS.

In his first claim for federal habeas relief, the petitioner asserts that the prosecution knowingly elicited false testimony in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). While the *Napue* and *Brady* claims have many issues in common, I will consider each in turn for the sake of clarity.

1. *NAPUE* VIOLATIONS.

In *Napue*, the Supreme Court explained that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment" and that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269, 79 S.Ct. 1173. In the Fourth Circuit, a *Napue* claim requires a showing of both (1) the falsity and materiality of testimony and (2) the prosecutor's knowledge of the falsity. *Basden v. Lee*, 290 F.3d 602, 614 (4th Cir.2002). In this context, false testimony "is material if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Id.* (quoting

United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). The petitioner alleges *Napue* violations in connection with the testimony of Timothy Berry, Terry Lee Johnson, Lieutenant Tim Rice, and Justin Jones.

2. TIMOTHY BERRY.

Bell contends that Timothy Berry perjured himself at Bell's trial when he testified that (1) Bell had said someone needed to "bust a cap in [Timbrook's] ass" and (2) he was not offered any consideration for his testimony. Bell further claims that this false testimony was a result of coercion by the prosecution, and that this misconduct had a reasonable possibility of affecting the jury's judgment given that Berry's testimony supplied motive. This claim was adjudicated on the merits in state habeas review, and the Supreme Court of Virginia found that the allegations of perjury regarding Berry's testimony were not supported by the record. Accordingly, the court denied Bell's *Napue* claim relating to witness Berry.

The factual determination of the state habeas court, finding that Berry had not committed perjury, must be afforded the presumption of correctness. The fact that the state court dismissed this *Napue* claim on the basis of affidavits, without holding an evidentiary hearing, does not disturb this presumption. *See Carter v. Johnson*, 131 F.3d 452, 460 n. 13 (5th Cir.1997) (holding that findings of fact based on affidavits alone are generally sufficient to warrant the presumption under § 2254(d)). On review of the record, I find that the state court's factual findings on this claim and accompanying

decision to deny Bell's Berry *Napue* claim were reasonable and deny relief.

The affidavit from Berry that Bell presented on state habeas review stated that Ricky Bush, a Winchester police officer, (1) threatened to send Berry to jail for an alleged crack sale if he did not testify and (2) coached Berry as to what he should say on the stand. Berry also alleged in the affidavit that he never actually heard Bell use Timbrook's name or directly threaten Timbrook. Nonetheless, the record before the state court contained evidence sufficient to refute these claims.

The record shows that Berry repeatedly and specifically described to authorities the threat that Bell made on Timbrook's life. In sworn grand jury testimony, Berry testified that Bell, when referring to Timbrook, said he would "like to bust the cop in his ass." (Berry Grand Jury Test. at 143, Resp't's State App., Ex. 1.)[9] Similarly, in interviews with Sergeant Bush and FBI agent Stiefvater, Berry stated that he heard Bell comment that "he would

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[9] The state's filings cited here include the appendix to its filing in the state habeas action ("Resp't's State App."). "J.A.," preceded by the volume number, refers to the joint appendix filed by the parties in Bell's direct appeal, which is a part of the record in this case. Other state court records include the petitioner's appendix to his state habeas petition ("Pet'r's State App."), the petitioner's motion to supplement the petition for rehearing ("Pet'r's Mot. Supp. Pet. Reh'g"), and the petitioner's supplement to claims I and XIV ("Pet'r's Supp. State App.").

Documents filed by the petitioner for the first time with this court include the appendix to the petitioner's initial federal habeas petition ("Pet'r's App."), the petitioner's supplemental appendix ("Pet'r's Supp. App."), and his second supplemental appendix ("Pet'r's Second Supp. App.").

like to put a cap in [Timbrook's] ass." (Berry FBI Interview at 2, Resp't's State App., Ex. 4.) Furthermore, an affidavit from Bush that was presented to the state court stated that Bush told Berry the police would not give him any consideration or benefit for his information and that neither Bush nor Stiefvater had any knowledge upon which to base a drug charge against Berry. Based on this evidence, I find that the state court's finding that Bell's perjury claim regarding Berry lacked merit was reasonable. Therefore, I deny this *Napue* claim.

3. TERRY LEE JOHNSON.

Similar to his contentions with regard to Berry, Bell claims that the prosecutor knew of and suborned material false testimony from witness Terry Lee Johnson. Johnson's key testimony was that, while he and Bell were in jail together, Bell confessed to shooting Sergeant Timbrook. Bell claims that Johnson lied when he testified that Bell confessed to the murder and also when he testified that he did not receive any promises in exchange for his testimony. This *Napue* claim was adjudicated on the merits in state habeas review, thus I must again apply the deferential standard of review set forth in § 2254(d).

The Supreme Court of Virginia denied Bell's Johnson *Napue* claim on the merits for the same reasons that it rejected the Berry *Napue* claim. Specifically, the court found that "[t]he record, including the affidavits of police officers who interviewed Berry and Johnson, demonstrates that ... no consideration was promised in exchange for ... Johnson's testimony" and that Johnson did not state

in his affidavit that his sworn trial testimony was a lie. *Bell II*, slip op. at 2. Bell argues that the state court's decision on this claim was contrary to or involved an unreasonable application of clearly established federal law and that it was based on an unreasonable determination of the facts in light of the record before the state court. Alternatively, Bell argues that, even if the Supreme Court of Virginia's decision was reasonable, he has rebutted the finding of no perjury with a new affidavit from Terry Lee Johnson. Upon review of the record and applicable law, I find that the Supreme Court of Virginia's decision regarding Johnson's testimony was reasonable and that Bell has failed to overcome the presumption of correctness that attaches to that decision. Therefore, I deny relief on the Johnson *Napue* claim.

Bell argues that habeas relief is available under § 2254(d)(1) because the Supreme Court of Virginia unreasonably applied federal law when it struck an affidavit from Jonathan Sheldon and refused to give Bell a hearing on his Terry Lee Johnson claim.

The Supreme Court of Virginia was presented with an affidavit from Johnson and an affidavit from attorney-investigator Jonathan Sheldon in support of the Johnson *Napue* claim. The Sheldon affidavit recounted several things that Johnson allegedly told Sheldon, including that (1) Johnson's conversations with the prosecutor were recorded; (2) Johnson told both the detectives and the prosecutor that he didn't know anything about Bell's case; (3) the prosecutor promised Johnson work release, a more favorable facility, and release from prison in "nine months, tops" in exchange for his testimony; and (4) Johnson would not sign an affidavit stating that his trial

testimony was a lie because he did not want to be prosecuted for perjury. (Sheldon Aff., Pet'r's State App., Ex. 28.) The court granted the State's motion to strike this affidavit on hearsay grounds, however, and thus the court did not consider it when it made the determination that the Johnson *Napue* claim was without merit. Therefore, the only evidence the court considered in support of the Johnson *Napue* claim was the Johnson affidavit. In this affidavit Johnson stated that: (1) the detectives reviewed newspaper articles about Bell's case with him, (2) conversations between him and the police regarding Bell were recorded, (3) the police let him walk freely in the courthouse, (4) the police gave him gifts of cigarettes and sandwiches, (5) the prosecutor threatened him with a three-year mandatory minimum sentence if he refused to take the oath swearing to the truth of his trial testimony,[10] and (6) he was afraid to cooperate further with Bell's investigators because of fear that the police and prosecutors would come after him. (Johnson Aff., Pet'r's State App., Ex. 9.)

Bell claims that the Supreme Court of Virginia's method of examining the record constituted an unreasonable application of federal law based on the Fourth Circuit case of *United States v. Mason*, 52

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[10] The day following Johnson's testimony, the trial court was informed that Johnson had not been sworn, and the state requested that the court reopen its case and swear Johnson retroactively. The defense objected, but the court ruled in the state's favor, administered an oath to Johnson with respect to his prior testimony, and instructed the jury that they could consider the testimony sworn.

F.3d 1286 (4th Cir. 1995).[11] *Mason* held that it was error for a court to ignore hearsay affidavits prepared by defense counsel when considering whether to conduct a competency hearing. *Id.* at 1292. *Mason* was a pre-AEDPA case, however, and the "decision ... was grounded in a statute which plainly requires judges to grant a competency hearing when a defendant has shown 'reasonable cause.' " *United States v. Cropp*, 127 F.3d 354, 362 (4th Cir. 1997) (quoting 18 U.S.C. § 4241(a)) (qualifying *Mason*). The Supreme Court of Virginia relied on its own state evidentiary rules in striking the Sheldon affidavit, and it can hardly be said that failure to consider such inadmissible hearsay when considering a *Napue* claim constitutes error, let alone an unreasonable application of federal law.

Bell next contends that habeas relief is independently available for his Johnson *Napue* claim

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[11] Bell also asserts that striking the Sheldon affidavit constituted an unreasonable application of federal law based on *Napue*. To support this contention, Bell points out that the Supreme Court in *Napue*, when responding to the argument that it was bound by a factual determination of the Illinois Supreme Court, stated that the "duty of [the Supreme] Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on [the Supreme Court's] solemn responsibility for maintaining the Constitution inviolate." 360 U.S. at 271, 79 S.Ct. 1173. Bell asserts that this language stands for the proposition that any court reviewing a *Napue* claim has a duty to make its own independent examination of the record, and that the Supreme Court of Virginia abdicated this duty when it struck the Sheldon affidavit on hearsay grounds. However, this argument ignores the fact that the Supreme Court of Virginia itself was the court making the "independent examination of the record."

under § 2254(d)(2) because the Supreme Court of Virginia's factual determination that Johnson's testimony was not false was unreasonable in light of the record before the state court. To support this contention, Bell again argues that the state court should have considered the Sheldon affidavit. Bell contends that the Sheldon affidavit established that Johnson twice perjured himself. Bell further asserts that the Sheldon affidavit in conjunction with the Johnson affidavit provides overwhelming support for his Johnson *Napue* claim, making the Supreme Court of Virginia's factual finding unreasonable.

Bell admits that if the hearsay affidavit was excluded on an independent and adequate state ground, there would be a procedural bar to the evidence contained therein and this court could not consider it in assessing the reasonableness of the state court's decision. *See Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir.2000). Bell asserts, however, that the order striking the Sheldon affidavit as hearsay was not an independent and adequate state ground and in the alternative that he can establish cause and prejudice sufficient to override it. I disagree, and hold that the state court's factual determination was reasonable in light of the evidence before it.

Bell argues that the law surrounding admission of affidavits in original actions before the Supreme Court of Virginia is too confused to give rise to an adequate state ground barring federal review. In *Burket v. Angelone*, however, the Fourth Circuit clearly explained that federal courts "do not sit to review the admissibility of evidence under state law unless erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally

fair proceeding." 208 F.3d at 186. At issue in *Burket* was the Supreme Court of Virginia's order striking two affidavits on state habeas. *Id.* at 185. The Fourth Circuit explained that striking of one of the affidavits was not erroneous because it was "obviously inadmissible hearsay" and further noted that "even if the Virginia Supreme Court's evidentiary ruling was erroneous, the ruling was not so extreme as to result in the denial of a constitutionally fair proceeding." *Id.* at 186. Thus the Fourth Circuit concluded that it could not consider the stricken hearsay affidavit in its review of the claims before it. *Id.* Similarly, I find that the Supreme Court of Virginia struck the Sheldon affidavit on adequate and independent state grounds. Therefore, I cannot consider it on review of Bell's Johnson *Napue* claim absent a showing of cause and prejudice or fundamental miscarriage of justice.

Bell argues that even if the exclusion of the affidavit was an independent and adequate state ground, he can overcome the procedural bar by showing cause and prejudice. "[C]ause for a procedural default ... ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Bell argues that Johnson's claim that he was afraid to cooperate with Bell's habeas investigator constitutes cause. Bell further contends that prejudice is established because if the Sheldon affidavit had been considered, an evidentiary hearing on the Johnson *Napue* claim would have been warranted. I find that Johnson's unexplained "fear" does not establish the cause

necessary to overcome the procedural bar to consideration of the hearsay affidavit, and thus I need not address the prejudice prong.

Without the Sheldon affidavit, the only evidence before the Supreme Court of Virginia suggesting any false testimony by Johnson was the Johnson affidavit. This affidavit stated only that detectives had reviewed newspaper articles about Bell's case with Johnson, that Johnson's interviews with the police were tape-recorded, that he was given sandwiches and cigarettes during interviews, that the prosecutor threatened him with a three-year mandatory sentence when he refused to be sworn after giving his trial testimony, and that he was afraid to cooperate with Bell's habeas investigator. The record before the state court showed that Johnson never identified any promises allegedly made to him in exchange for his testimony. As the Supreme Court of Virginia pointed out in its opinion, affidavits of police officers who interviewed Johnson stated that no consideration was promised in exchange for Johnson's testimony. The Supreme Court of Virginia further noted that Johnson did not state in his affidavit that his testimony at trial was false or that he received any consideration for his testimony. I find that the Supreme Court of Virginia's finding that the claims of perjury with respect to Johnson were without merit is reasonable in light of the record before it.

Finally, Bell contends that even if the Supreme Court of Virginia's resolution of Bell's *Napue* claim regarding Johnson was not unreasonable and the presumption of correctness attaches under § 2254(e)(1), the new Johnson affidavit serves to overcome that presumption by clear and convincing

evidence. I find that Bell failed to develop the factual basis of this claim in state court and thus the new Johnson affidavit cannot be considered on federal habeas review. In the alternative, I find that even if the information in the new Johnson affidavit is considered, Bell's claim is without merit.

Under § 2254(e)(1) a habeas petitioner can rebut the presumption of correctness that attaches to a reasonable state court decision by clear and convincing evidence, and § 2254(e)(2) dictates when a petitioner may adduce new evidence to do so. Under § 2254(e)(2), a petitioner cannot present new facts in federal court unless (1) he was diligent in developing his claim in state court or (2) he was not diligent but his claim relies on either a new rule of constitutional law made retroactive by the Supreme Court or new facts that could not have been previously discovered through the exercise of due diligence and the facts would be sufficient to establish, by clear and convincing evidence, that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offence. *Williams v. Taylor*, 529 U.S. 420, 435–36, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). If the petitioner can pass this hurdle, then this court can consider the new evidence.

Bell argues that because he made requests for evidentiary hearings, funding for investigators, and discovery before and during state habeas proceedings, he was diligent and can thus present the new Johnson affidavit. He also contends that his multiple meetings with Johnson establishes diligence in developing the Johnson *Napue* claim. Bell attempts to draw parallels between the efforts deemed sufficiently diligent in *Williams* and the

efforts he took during the state proceedings, and suggests that his efforts actually exceed those deemed diligent in *Williams*.

Williams did state that "if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings" through requests for investigators and expert services denied in the state proceedings," § 2254(e)(2) will not bar him from developing them in federal court." *Id.* at 443, 120 S.Ct. 1479. However, Bell ignores the fact that in his state habeas case he did have at least one investigator who met with Johnson several times. He had full access to Johnson, and there is nothing in the new Johnson affidavit explaining why he was unable to make the new affidavit during the state court proceedings. Therefore, I find that Bell was not diligent in developing his Johnson claim under *Williams*. Bell does not claim that he can make the stronger showing required when diligence is not exercised, thus the new affidavit is barred by § 2254(e).

Moreover, even if Bell were diligent in developing his Johnson claim in state court and I were to consider the new Johnson affidavit, it does not establish by "clear and convincing" evidence that the decision of the Supreme Court of Virginia was unreasonable. See 28 U.S.C.A. § 2254(d)(1), (e)(1). The new affidavit states that the prosecutor promised Johnson a more favorable facility and a shorter sentence to get him to testify, gave him cigarettes and other gifts during the interview, gave him reports about Bell's case to read, and promised him contact visits with his family. It also states that he initially told police he did not know what happened in Bell's case. Nonetheless, Johnson still

does not claim that he lied about Bell's jailhouse confession. As to the alleged consideration for his testimony, there are affidavits from police officers stating that they never promised Johnson anything in exchange for his testimony. Furthermore, it is uncontested that Johnson was sentenced to prison before he had contact with the police regarding Bell's case, which tends to show that there could have been no promises made that would have affected his sentence. Therefore, even if I consider the new Johnson affidavit, Bell has failed to provide clear and convincing evidence that the Virginia court's finding of no perjury was unreasonable.

As a fallback position, Bell argues that even if the new Johnson affidavit does not provide clear and convincing evidence on its face, it provides sufficient evidence to warrant an evidentiary hearing. A petitioner may receive an evidentiary hearing if he: (1) alleges additional facts which, if true, would entitle him to relief and (2) satisfies one of the six factors identified in *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). *See Walker v. True*, 401 F.3d 574, 584 (4th Cir.2005). Even if a petitioner can make such a showing, however, any failure to develop the factual basis of a claim in state court bars an evidentiary hearing. *Id.* (citing 28 U.S.C.A. § 2254(e)(2) and *Fullwood v. Lee*, 290 F.3d 663, 681 (4th Cir. 2002)). Because I have found that Bell failed to develop the factual basis of his Johnson *Napue* claim, an evidentiary hearing on the issue is precluded.

4. TIMOTHY RICE.

Bell makes a *Napue* claim regarding the search for the murder weapon, alleging that the prosecution

knowingly solicited false and misleading testimony from police Lieutenant Timothy Rice about the initial search. At trial, Rice testified that the metal detectors used during the initial search on October 30, 1999, could not be used within five feet of the house because of complications caused by metal inside the home. When asked about the number of officers involved in the initial search, he claimed that he could not remember the exact number and noted that there were more than five officers at various times. Bell argues that this testimony was false and was purposely used by the prosecution to minimize the search conducted on October 30, thereby undermining the defense theory that someone else shot Timbrook and that the real shooter planted the gun when the crime scene was left unsecured after the initial search. It is Bell's contention that the search on October 30 was actually quite thorough, and thus the gun would have been discovered if it were there at the time. Bell argues that the allegedly false testimony from Officer Rice makes the October 30 search seem less extensive than it actually was and therefore unfairly strengthens Bell's connection to the gun.

To support the argument that Rice's testimony was perjured, Bell relies on a police report written by Officer Greggs describing the October 30 search. This report states that on that day, "[u]tilizing all the manpower at the scene [,] all three properties were searched from front to back, looking for a weapon, with negative results." (Pet'r's Supp. State App., Ex. 1, at 2.) The report further states that approximately thirty police officers participated in the search. To argue that the testimony about the metal detector was false, Bell relies on an affidavit

from Larry Peters, in which Peters states that there was no metal or interference at the spot the gun was found.[12] At the end of this claim, Bell adds a claim of ineffective assistance of counsel for trial counsel's failure to effectively cross-examine Rice or call rebuttal witnesses. Because I find that the *Napue* claim regarding the search and the accompanying ineffective assistance claims were procedurally defaulted during the state court proceedings, I deny relief.

Bell did not present this claim to the Supreme Court of Virginia until January 9, 2004—ten months after he initially filed his state habeas petition—when he filed a "supplement" to his original petition, followed by a motion to supplement. The state made a motion to strike the supplement on the ground that it was untimely under section 8.01-654.1 of the Virginia Code. In its April 29, 2004, order, the Supreme Court of Virginia denied Bell's motion to supplement by saying "[t]he Court denies petitioner's ... 'supplement to claims I and XIV in petition for writ of habeas corpus.' " *Bell II*, slip op. at 30. Bell argues that this dismissal was not in reliance on a procedural bar. He argues that if such were the case, the court would have said so. Bell further contends that if the denial had been truly based on a procedural bar, the court would have granted the

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[12] This affidavit was not presented in state court and could have been if petitioner had been diligent. Thus if the claims regarding the search for the murder weapon were not procedurally barred and I were to decide these claims on their merits, I would be barred from considering this affidavit pursuant to § 2254(e)(2).

state's motion to strike rather addressing the supplement directly.

It is true that "if 'it fairly appears that the state court rested its decision primarily on federal law,' [a federal court] may reach the federal question on review unless the state court's opinion contains a 'plain statement' that [its] decision rests upon adequate and independent state grounds." *Harris v. Reed*, 489 U.S. 255, 261, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (quoting *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)). However, this plain statement requirement "applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. In the rest of the cases, there is little need for a conclusive presumption [that the state court relied on federal law]." *Coleman v. Thompson*, 501 U.S. 722, 739, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

There is nothing in the Supreme Court of Virginia's order denying Bell's motion to supplement that makes it "fairly appear" that the court was relying on federal law. Furthermore, the "surrounding circumstances (in particular the fact that the State had rested its argument entirely upon a procedural bar), indicated that the basis was procedural default." *Ylst v. Nunnemaker*, 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Therefore, I find that Bell's *Napue* claim regarding the search for the weapon and the accompanying ineffective assistance claim is procedurally defaulted.

When a state court has declined to consider the merits of a constitutional claim on the basis of an adequate and independent state procedural rule, a federal habeas court may not review the claim absent cause and prejudice. *See Harris*, 489 U.S. at 262, 109 S.Ct. 1038. To demonstrate cause, the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Bell did not attempt to argue cause in the event this claim was deemed defaulted, and the record shows that cause is notably absent. Bell had access to Officer Gregg's police report throughout his trial, and thus it cannot be said that a factor "external to the defense" was responsible for state habeas counsel's failure to raise the murder weapon search issue in a timely manner. *See Swisher v. True*, 325 F.3d 225, 231 (4th Cir.2003). Bell cannot rely on the alleged ineffectiveness of his trial counsel because "[t]he requisite ineffective assistance ... 'is itself an independent constitutional claim' subject to the requirement of exhaustion in state court and to the doctrine of procedural default." *Id.* (quoting *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000)).

Furthermore, even if Bell had cause for this procedural default, he suffered no prejudice. Nothing in Officer Rice's testimony directly conflicts with Officer Gregg's report, and thus Bell's claim that this testimony was perjured is weak at best. Additionally, in view of the strong circumstantial case against Bell and the minimal role of Rice's testimony, I cannot find that there is a reasonable likelihood that the jury would have acquitted Bell

had it known that Rice's testimony was misleading or arguably false. I therefore find that Bell has failed to demonstrate prejudice to overcome the default of this claim.

5. JUSTIN JONES.

Bell raises a *Napue* claim that the prosecutor elicited false testimony from trial witness Justin Jones, and supports this claim with a new affidavit first filed in this court. At trial, Justin Jones testified that Bell attempted to sell him the gun later determined to be the murder weapon. In the affidavit filed with Bell's federal habeas petition, Justin Jones states that he "initially told the police, at least three times, that [he] knew nothing about the incident or the gun and [he] denied involvement in any way." (J. Jones Aff., ¶ 3, Pet'r's Supp. App., at 1.)

This claim was not presented to the state court until Bell filed the supplement to his original petition on January 9, 2004, which the Supreme Court of Virginia refused. As set forth above, I find that this ruling was based on adequate and independent state grounds and serves as a procedural bar to federal habeas review absent a showing of cause and prejudice.

Attempting to excuse the untimeliness of his Jones *Napue* claim, Bell focuses on § 2254(e)(2) and argues that he did not fail to develop the factual basis of this claim in state court. He contends that he diligently sought resources for investigation, appointment of an additional attorney, more time for investigation, and an evidentiary hearing in state court and is thus permitted to introduce new evidence under *Williams*. Because I find that Bell

raised his Jones *Napue* claim in state court and the Supreme Court of Virginia dismissed it on procedural grounds, the question of whether Bell can raise it on federal review is better analyzed under the cause-and-prejudice exception to procedural default rather than under § 2254(e)(2). *See Swisher v. True*, 325 F.3d 225, 230–31 (4th Cir.2003) (applying cause-and-prejudice analysis to determine if petitioner could assert a claim in his federal habeas petition that the state court found defaulted). Nonetheless, this makes little practical difference given that the *Williams* diligence standard is modeled after the cause-and-prejudice standard applied to procedurally defaulted claims. *See Williams v. Taylor*, 529 U.S. 420, 433, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). I find that Bell's efforts fall short of both the *Williams* diligence standard and the cause-and-prejudice standard for procedurally defaulted claims and thus deny his Jones *Napue* claim.

While Bell did seek discovery and resources for more investigation during state habeas proceedings, he never suggested in his original state habeas petition that his *Napue* claim might involved the testimony of Justin Jones. Furthermore, Bell has never been denied access to Justin Jones, yet he never attempted to have his investigators develop this claim in a timely fashion. Thus, Bell cannot show the cause necessary to excuse his default. In addition, even if I did not find that the Jones *Napue* claim was foreclosed from federal review, it appears from the record that it is without merit. Nothing in the Jones affidavit asserts that Jones committed perjury at trial, or that the prosecution knowingly presented perjury from him.

6. BRADY VIOLATIONS.

In *Brady v. Maryland*, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The three necessary elements of a *Brady* claim are: "(1) the evidence must be favorable to the accused; (2) it must have been suppressed by the government, either willfully or inadvertently; and (3) the suppression must have been material." *Monroe v. Angelone*, 323 F.3d 286, 299–300 (4th Cir.2003) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). In this context, "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.)). The disclosure requirement covers both impeachment material and other exculpatory evidence. *Id.* Bell claims *Brady* violations in connection with several of the state's witnesses.

7. TIMOTHY BERRY AND TERRY LEE JOHNSON.

Bell claims that the alleged promises made to or threats made against Johnson and Berry and the fact that Johnson initially told the police he knew nothing about Bell's case constituted *Brady* material

that should have been disclosed by the state. Because I find that the state court's decision on this claim was reasonable, I deny relief.

In its order dismissing Bell's state habeas petition, the Supreme Court of Virginia held that the *Brady* claims with respect to Berry and Johnson were without merit. *Bell II*, slip op. at 2–3. Specifically, the court found that the record did not support Bell's claims that either Berry or Johnson received consideration for their testimony or were untruthful on the stand. *Id.* Based on the record before the state court as outlined above, I find this decision was reasonable. Additionally, I decline to consider the new Johnson affidavit in analyzing Bell's Johnson *Brady* claim because, as explained above, Bell failed to develop this evidence in the state court.

8. PATRICK SIMPSON.

In July of 2004, Bell's counsel became aware of a witness named Patrick Simpson who stated in an affidavit that he had been present on Piccadilly Street on the night of the shooting, had seen a white man with a gun whom he believed to be the shooter, and had seen several civilians entering and leaving the crime scene. Simpson noted that he had recounted all of these observations to the police the following morning. Bell argues that the prosecution failed to disclose these statements made to the police in violation of *Brady*. Because I find this claim was procedurally defaulted in the state court proceeding and Bell cannot demonstrate cause and prejudice to overcome that default, I must deny relief.

Bell did not present this argument to the state court until he filed a motion for leave to amend the

original state habeas petition on August 18, 2004, four months after the Supreme Court of Virginia had dismissed his habeas petition. The State opposed the motion on the procedural ground that Virginia state law forbids the filing of new claims after the statutory limitations period has run. *See Morrisette v. Warden*, 270 Va. 188, 613 S.E.2d 551, 555 n. 3 (2005). The Supreme Court of Virginia denied Bell's untimely motion in an order dated September 2, 2004. The order stated only that "the Court denies the motion," but, as discussed above, this brevity does not foreclose a finding that the ruling was based on an independent and adequate state ground. Based on the analysis set forth above, I find that the denial was indeed based on an independent and adequate state ground and thus constitutes a procedural default.

Bell again argues diligence under *Williams* to circumvent the default, and for the reasons stated above, I find that this claim is properly analyzed under the cause-and-prejudice rule applicable to procedural default. Bell contends that he was diligent throughout his trial, appeal, and collateral proceedings and that the only reason he failed to assert this claim in a timely fashion was that his multiple requests for assistance and information were denied. However, Bell did have assistance from investigators and the evidence shows that a police report containing Simpson's account of what he witnessed on the night of the murder was provided to Bell's trial counsel before trial. Thus, it cannot be said that "some objective factor external to the defense impeded counsel's efforts" to assert this claim in Bell's initial state habeas petition. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91

L.Ed.2d 397 (1986). Thus, I find that Bell cannot establish cause to excuse his default and deny relief on this claim.

9. JASON PLUMMER AND MARLENE COMBS.

Jason Plummer and Marlene Combs both testified at Bell's trial about a conversation between the three of them in a car. In essence, the testimony of both of these witnesses was that Bell had threatened to shoot Sergeant Timbrook. After trial, Plummer declared in an affidavit that the police had threatened to charge him as an accessory to Timbrook's murder if he did not testify and that the police had put him and Combs together in a room to get their stories straight. It is Bell's contention that these facts provided valuable impeachment evidence and the prosecution's failure to disclose such facts constituted a *Brady* violation.

This claim was not presented to the state court until Bell filed the supplement to his original petition on January 9, 2004, which the Supreme Court of Virginia dismissed without opinion. As set forth above, I find that this ruling was based on adequate and independent state grounds and serves as a procedural bar to federal habeas review absent a showing of cause and prejudice.

Bell claims that the same trial and state habeas efforts he relied upon to show diligence and cause with respect to his *Brady* claim regarding Simpson, namely the denied requests for discovery and investigatory assistance throughout his state habeas proceedings, establish diligence and cause excusing the default of his *Brady* claims regarding Plummer and Combs. I find that Bell lacks sufficient cause, however, given that Bell had investigatory help and

was never denied access to Plummer. I see no reason "external to the defense" why Bell's state habeas counsel could not have obtained the affidavit from Plummer in time to present this claim to the state court in a timely fashion. *See Murray*, 477 U.S. at 488, 106 S.Ct. 2639. I therefore deny relief on this claim.

10. TERRY, STARKS-CADET, SWARTZ, AND OTHERS.

Bell also contends that the prosecution withheld *Brady* material with respect to Aretta Terry, Rosa Starks-Cadet, Billie Joe Swartz, and other trial witnesses.

Terry testified at Bell's trial that she had disposed of bullets from Bell's car after the murder. Bell has now presented an affidavit from Terry in which she claims that the police approached her and threatened to charge her as an accessory or conspirator to the murder of Timbrook if she did not testify. She also states that her meeting with the police was recorded and that during the interrogation she told police that she had seen Bell on the night of the murder at 11 p.m. on the outskirts of Winchester returning from the Charlestown Racetrack. Bell contends that this constituted significant exculpatory evidence because the fact that Terry saw Bell returning from the racetrack at that time tends to undermine Jones' testimony that Bell attempted to sell him the murder weapon earlier that evening around 9 p.m.

Bell claims that the police withheld exculpatory evidence regarding Rosa Starks Cadet because the police approached Starks-Cadet and promised her that if she helped the state with its investigation she would be released from jail the following day. In

exchange for release from jail, a reduction in her sentence, and one hundred dollars, Starks-Cadet questioned Aretta Terry and tape-recorded the conversations. Bell contends that the prosecution's failure to disclose both the details surrounding Stark-Cadet's participation and the tape recording constituted a violation of *Brady*.

Billie Joe Swartz testified at trial that she and Bell would target shoot together and that Bell was a good shot, that Bell complained that Sergeant Timbrook harassed him, and that Bell had threatened her when she was waiting in a holding cell to testify. Bell has submitted an affidavit from Swartz in which she states that at the time she testified she "was put in the work release program and given privileges you don't normally get in jail such as access to the washer and dryer." (Swartz Aff., ¶ 5, Pet'r's App., at 100.) Bell claims that this demonstrates a promise made in exchange for Swartz's testimony and the prosecution's failure to disclose this promise violated *Brady*.

Finally, Bell alleges *Brady* violations in connection with Dawn Jones, Rachel Wlash, and Daniel Spitler. Bell claims that both Dawn Jones and Rachel Wlash were threatened or given promises or both in exchange for testimony and that Daniel Spitler was working as a police informant at the time he witnessed the events on the night of Timbrook's murder. Bell claims that the prosecution's failure to disclose these facts to the defense violated *Brady*.

Bell had presented his claims with respect to Spitler and Wlash in his untimely supplement to the Supreme Court of Virginia on January 9, 2004, and for the reasons stated above, I find that these claims

are procedurally defaulted and barred from review absent a showing of cause and prejudice or a demonstration that failure to consider the claims would result in a fundamental miscarriage of justice. *See Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Bell again cites his requests for discovery, investigatory assistance, and evidentiary hearings throughout his state habeas proceedings in an attempt to excuse his failure to timely present these claims. It is Bell's contention that the prosecution withheld the exculpatory evidence relating to Spitler and Wlash and therefore Bell could not otherwise obtain this information. Even if Bell could establish cause, however, he would be unable to show prejudice.

To succeed on a *Brady* claim, one must show that suppressed exculpatory evidence was material. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. Undisclosed evidence is material when its effect is such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotations omitted) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.)). Evidence that does not meet this threshold necessarily fails to satisfy the prejudice prong of the procedural default standard. *See Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Even if Wlash was intimidated by the police and Spitler was an informant, this information is not enough to undermine their testimony, let alone undermine the entire verdict.

Bell's *Brady* claims regarding Terry, Starks-Cadet, Swartz, and Dawn Jones are all raised for the first time on federal habeas review. Under § 2254(e)(2), a petitioner cannot present a new claim for the first time on federal habeas review unless (1) he was diligent in developing his claim in state court or (2) he was not diligent but his claim relies on either a new rule of constitutional law made retroactive by the Supreme Court or new facts that could not have been previously discovered through the exercise of due diligence *and* the facts would be sufficient to establish, by clear and convincing evidence, that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense. *See Williams v. Taylor*, 529 U.S. 420, 435–36, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).[13]

Bell argues that he was diligent in developing all of these claims in state court based on his requests for discovery, investigatory assistance, and evidentiary hearings. Nonetheless, Bell had free

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[13] This could also be viewed as a procedural default that must be analyzed under the cause-and-prejudice standard. *See Williams v. Stouffer*, No. 01-1675, 2001 WL 34036606, at *2, 2001 U.S. Dist. LEXIS 24896, at *6–7 (D.Md. Nov. 9, 2001) (stating that "[t]o the extent that claims ... were not presented in the state courts or preserved in petitioner's applications for leave to appeal from the denial of appellate or post conviction relief" the petitioner is procedurally defaulted from asserting such claims on federal habeas review absent a showing of cause and prejudice); *see also Gray v. Netherland*, 518 U.S. 152, 162, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). Nonetheless, because Williams itself dealt with claims raised for the first time on federal habeas review, I find that these claims are more appropriately analyzed under § 2254(e)(2). *See Williams v. Taylor*, 529 U.S. at 429, 120 S.Ct. 1479.

access to all of these witnesses during the state proceedings. Indeed, both Terry and Swartz state in their affidavits that defense counsel had never tried to interview them earlier but that they would have cooperated had defense counsel done so. Furthermore, in an affidavit attached to Bell's initial petition for habeas corpus in state court, Dawn Jones stated that she felt harassed, intimidated, and pressured by the police when they approached her to testify. This shows that Bell's state habeas counsel was aware of potential police threats and promises in exchange for testimony other than those connected to Johnson and Berry, but chose not to raise them at that time. Based on this evidence, I find that Bell was not diligent in developing his Brady claims relating to these witnesses and thus hold that these claims are barred under § 2254(e)(2).[14]

Despite the fact that Bell never presented his *Brady* claims regarding Terry, Starks-Cadet, Swartz, and Dawn Jones to the state court, he argues that they are not foreclosed from review because of Virginia's newly created writ of actual innocence. The relevant Virginia statute provides that, "[n]otwithstanding any other provision of law or rule of court, upon a petition of a person who was

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[14] Even if I were to find that Bell had been diligent as to his Brady claims regarding Terry, Starks-Cadet, Swartz, and Dawn Jones, I would be compelled to deny them on the merits. The evidence of Bell's guilt at trial was strong, and, even if all of Bell's allegations regarding these witnesses were true, it cannot be said that this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence... ." Va.Code Ann. § 19.2–327.10 (Michie 2004). However, in petitioning the Virginia Court of Appeals for such a writ, a petitioner must allege, among other things, that the evidence supporting the allegation of innocence was "unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final" and "that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction." Va.Code Ann. § 19.2- 327.11 (Michie 2004). As explained above, Bell's trial counsel had access to these witnesses and could have interviewed them at any time, but failed to do so. Therefore, he cannot meet the standard for Virginia's writ of actual innocence.

Furthermore, in petitioning for a writ of actual innocence one must allege that "the previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* Given the substantial amount of circumstantial evidence implicating Bell in this case, he would be unable to overcome this hurdle. Moreover, even if Bell could successfully petition for a writ of actual innocence, it is clear that the Virginia legislature did not intend that a pending or potential petition for writ of actual innocence should delay or stay post-conviction proceedings in this court. *See id.* ("Nothing in this chapter shall constitute grounds ... to delay or stay

any other post-conviction appeals or petitions to any court.") Accordingly, Virginia's writ of actual innocence process does not cure Bell's failure to assert these *Brady* claims in state court, and they must be denied under § 2254(e)(2).

B. CLAIM II—CONFLICT OF INTEREST.

Prior to witness Terry Lee Johnson's testimony, defense counsel Mark B. Williams informed the court that he had previously represented Johnson on several criminal charges. Williams explained that Bell was aware of the prior representation and that co-counsel Fischel would conduct the cross-examination to cure any potential conflict. These assurances from defense counsel satisfied the court on the potential conflict issue and it was not addressed further. Bell argues that Williams' prior representation of Johnson constituted a conflict of interest. This conflict claim is broken up into three subparts: (1) William's prior representation constituted a conflict of interest per se; (2) the trial court failed to obtain a knowing and voluntary waiver from Bell after being put on notice of the conflict; and (3) Bell's trial and appellate counsel were ineffective for failing to assert this issue at trial and on appeal.

In his state habeas proceeding, Bell filed one oversized habeas petition and one corrected habeas petition complying with the page limitations. In his oversized petition, Bell set forth a claim that his right to effective assistance of counsel was violated when the court, after being put on notice of a potential conflict, failed to obtain from Bell a knowing and voluntary waiver of William's conflict of interest. The State contends that Bell abandoned

this claim in his corrected state petition and that it is thus barred from federal habeas review. Although Bell did not set this argument forth as a separate claim for relief in his corrected petition, he did mention the waiver of conflict issue at the end of a different claim. Therefore, he did not abandon it. Nonetheless, the Supreme Court of Virginia expressly ruled in its opinion denying habeas relief that this claim was procedurally defaulted under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, 682 (1974), because it could have been raised at trial or on direct appeal but was not so raised. *Bell II*, slip op. at 16–17. Accordingly, this aspect of Bell's conflict claim is barred from federal habeas review absent a showing of cause and prejudice. *See Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Because nothing "external to the defense" prevented him from raising this claim on direct appeal, Bell cannot demonstrate the requisite cause to excuse this default and I must deny this aspect of Bell's conflict claim. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

Bell did not raise the conflict per se or ineffective assistance of counsel aspects of his conflict claim in state court. In essence, they are two new claims raised for the first time on federal habeas review. Under § 2254(e)(2), a petitioner cannot present a new claim for the first time on federal habeas review unless (1) he was diligent in developing his claim in state court or (2) he was not diligent but his claim relies on either a new rule of constitutional law made retroactive by the Supreme Court or new facts that could not have been previously discovered through the exercise of due diligence and the facts

would be sufficient to establish, by clear and convincing evidence, that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offence. *Williams v. Taylor*, 529 U.S. 420, 435–36, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Because the facts underlying his conflict per se and related ineffective assistance of counsel claims were readily available to state habeas counsel, I must deny these claims under § 2254(e)(2).

C. CLAIM III—MENTAL RETARDATION.

In Claim III of his petition to this court, Bell asserts that he is entitled to habeas relief because he is mentally retarded and cannot be executed under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In that case, the Supreme Court held that the execution of a mentally retarded defendant violates the Eight Amendment's ban on cruel and unusual punishment. Bell asserts that at a minimum the factual dispute regarding his mental retardation claim is sufficient to afford him an evidentiary hearing with this court.

In *Atkins v. Virginia*, the Supreme Court prohibited states from executing mentally retarded persons. The Court found that the cruel and unusual punishment clause of the Eighth Amendment must be read in the context of society's " 'evolving standards of decency' " which are best determined by evaluating legislation enacted by state legislatures. *Id.* at 312, 122 S.Ct. 2242 (quoting *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)). In reviewing the judgments of state legislatures, the Court found consistency in the "direction of change" in that state

legislation was overwhelmingly in favor of prohibiting such executions. *Id.* at 315, 122 S.Ct. 2242.

In furtherance of its ruling, the Court issued a directive which placed with the states the task of defining which offenders are mentally retarded. *Id.* at 317, 122 S.Ct. 2242 (" '[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' ") (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). Pursuant to the Court's directive, Virginia has defined mental retardation when it is relevant to capital sentencing by statute as:

> [A] disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Va.Code Ann. § 19.2-264.3:1.1(A) (Michie 2004). The statute requires that the state Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services maintain an "exclusive list of standardized measures of intellectual functioning." Va.Code Ann. § 19.2 264.3:1.1(B)(1) (Michie 2004).

A separate statute requires that a person alleging mental retardation as a bar to execution allege a

"factual basis" for such a claim and grants the Supreme Court of Virginia authority to dismiss the petition without an evidentiary hearing if it finds that it is "frivolous." Va.Code Ann. § 8.01-654.2 (Michie Supp.2005).

Bell presented this claim to the Supreme Court of Virginia in his state habeas action, which decided the claim on the merits and found that it was frivolous. The evidence presented to the state habeas court was as follows.

Dr. William Stejskal, a psychologist, evaluated Bell before trial at the request of his defense attorneys. Dr. Stejskal performed psychological testing and administered screening instruments, including one called the Raven's Progressive Matrices ("Raven's"), to determine whether Bell suffered from cognitive impairments. The Raven's is not contained on the exclusive list of standardized measures of intellectual functioning for capital sentencing purposes maintained by the state. Bell's trial counsel elected not to present Dr. Stejskal's findings at Bell's trial. In an affidavit filed in the state habeas action, Dr. Stejskal stated that Bell's performance on the screening instruments "yielded mixed results regarding cognitive functioning" and that "additional testing is likely to provide more definitive information about Mr. Bell's level of cognitive and adaptive functioning." (Stejskal Aff. ¶ 13, Pet'r's State App., Ex. 91.)

Prior to his trial, Bell was also seen by Marie Deans, a "mitigation investigator," who reported in an affidavit filed in the state habeas case that Bell "was extremely slow in imparting information" and "had a peculiar way of speaking that I suspected ... was a sign of neurological damage." (Deans Aff.

¶¶ 7, 9, Pet'r's State App., Ex. 17.) Further, she reported that "[i]t was clear that something was wrong with [petitioner's] cognitive abilities." (*Id.* at ¶ 8.)

After his conviction and in connection with his state habeas action, Bell was evaluated by Dr. Greg Gelburd, a family physician, who concluded in an affidavit that Bell "has very poor cognitive functioning that clearly indicates the need for further testing to determine the extent and source of his problems." (Gelburd Aff. ¶ 18, Pet'r's State App., Ex. 8.) Dr. Gelburd reached this determination after posing a series of questions that indicated that Bell was unable to name the number of months in a year, tell time, understand the concept of opposites, perform simple addition, and was unfamiliar with Roman numerals. Bell was successful in naming his birth date and four colors in a rainbow, and reciting numbers in a series in reverse.

Bell also presented an affidavit from Dr. Alexander Morton, a psychopharmacologist with expertise in the effects of drugs on thinking and behavior. Dr. Morton stated in his affidavit that the use of alcohol and marijuana by persons under the age of sixteen is "strongly related to permanent cognitive deficits" and that "chronic use ... by a child under the age of 10 would be expected to lead to significant permanent cognitive deficits." (Morton Aff. ¶¶ 5–6, Pet'r's State App., Ex. 42.)

In addition to these evaluations of Bell's cognitive functioning, the record before the Supreme Court of Virginia contained information from a presentence report regarding Bell's personal history. Among other things, that report stated that

Mr. Bell was born and raised in Jamaica. He came to the United States briefly before returning in 1992 to live. He is one of twelve children. His mother and father now live in Winchester, as do four sisters and one brother. One sister is deceased. Mr. Bell reports that no family members have felony records... .

Mr. Bell has fathered five children with three different women.

. . . .

Mr. Bell indicates that he last attended school in 1984. He reports getting average grades. He also claims that he had no attendance or disciplinary problems. He has not attempted to get a GED.[15]

Mr. Bell reports that he enjoys playing soccer and cricket, and attending the horse races in Charles Town, West Virginia. He admits to playing the slot machines there on occasion.

He says he attends church on a regular basis. He in [sic] a member of the Church of Christ. A deceased sister was a deacon in the church. He claims to read his Bible daily.

At the time of the offense, Mr. Bell says he was working part time assisting his father.

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[15] The report also indicated that Bell had ten years of schooling and had last attended a secondary school in Jamaica.

> Mr. Bell claims to have no outstanding bills. He did have a car loan, but understands the car was repossessed after his incarceration. He reports that he has not received any Public Assistance.

(Pet'r's State App., Ex. 29.) The report also advised that Bell had lived with Tracy Nicholson for approximately six years and had moved out several months before the murder. Although he paid no child support, he visited their three children regularly and provided needed items. The report recited that Bell had worked for six different employers from 1993 to 1999, including employment as a fork lift operator, and had numerous disciplinary problems.

Bell also offered the affidavit of his former wife in Jamaica, Barbara Williams, that Bell's childhood nickname had been "Nattyslow" because "he is quite slow" and "had below average grade" [sic]. (B. Williams Aff. ¶ 12, 13, Pet'r's State App., Ex. 1.) A Jamaican police officer testified at trial that Bell had the nicknames of "Slow or Boisey." (VII J.A. 2841.) His aunt from Jamaica stated by affidavit, that Bell "was a little slow in his brain." (Dermod Aff. ¶ 5, Pet'r's State App., Ex. 25.)

Finally, Bell presented an affidavit from one of his trial attorneys, Jud A. Fischel, who stated that Bell had difficulty understanding the case, focusing on what was relevant, and responding with relevant and helpful information.

In opposition to the claim of mental retardation, the state submitted the grand jury testimony of a witness who described Bell's drug trafficking operation, in which Bell used a pager and a cell phone in order to be available to his customers;

carefully packaged the crack cocaine so as not to disclose his fingerprints; kept his drug inventory hidden; and fronted drugs to others to sell. The state also produced documents that showed that while confined in jail Bell filed frequent written grievances, often in "eloquent" terms.[16]

The Supreme Court of Virginia issued its opinion denying Bell's habeas petition on April 29, 2004, based on the fact that Bell had "fail[ed] to present any evidence that he has performed at least two standard deviations below the mean on an IQ test" and had failed "to demonstrate that he has significant limitations in adaptive behavior." *Bell II*, slip op. at 4, 5. The court noted that

> the record demonstrates that, while petitioner's work history was varied, he was regularly employed. Although the record is not clear whether petitioner completed high school or withdrew after the tenth or eleventh grade, petitioner's own statements reveal that he maintained average grades. Petitioner lived independently and financially supported five children. He owned and drove a car, used a cell phone and pager, and read the Bible on a daily basis.

Id.

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[16] For example, Bell complained that "the state and county officials who govern and work within this facility and operate under color of law are not granting me my due process rights." (Resp't's Mot. Dismiss Ex. 5.) Bell has filed in this court an affidavit of another inmate of the jail who claims that "[f]or most of these forms, I wrote the text of the forms, and gave them to Bell to recopy in his own handwriting." (Smith Aff. ¶ 4, Pet'r's Second Supp. Aff., Ex. 1.)

Thereafter, on May 28, 2004, Bell filed a petition for rehearing. On June 17, 2004, he filed a motion to supplement petition for rehearing, alleging that following the denial of the habeas petition, counsel had obtained the opinion of Dr. Richard Ruth, "a psychologist with specific expertise in mental retardation and testing immigrants for intellectual functioning." (Pet'r's Mot. Supp. Pet. Reh'g, at 1.) Dr. Ruth opined that Bell's trial psychologist "seems to have made a fundamental error" in scoring the Raven's test and that "properly calculated" Bell had a score that "would correspond to an extrapolated IQ score equivalent of 68," which is more than two standard deviations below the mean. (Ruth Aff. ¶ 8, Pet'r's Mot. Supp. Pet. Reh'g.) Dr. Ruth reported that data related to Bell's adaptive behavior, obtained from interviews with personal acquaintances of Bell, are "typical of those seen in persons with mild mental retardation." (*Id.* ¶ 9.) Further, Dr. Ruth stated that the behaviors set forth by the Supreme Court of Virginia as proof of Bell's lack of mental retardation "cannot and should not" preclude a finding of mild mental retardation. (*Id.*)

Dr. Ruth's affidavit presenting his conclusions was filed with the Supreme Court of Virginia on September 10, 2005, along with a cover letter from counsel stating that it had been intended that the affidavit be filed with the motion to supplement.

The Supreme Court of Virginia denied the petition for rehearing by order of November 17, 2004, without further discussion of the mental retardation issue or of the motion to supplement the record.

I find that Bell is not entitled to relief based on the Supreme Court of Virginia's adjudication of this

claim on the merits. To be afforded such relief, Bell must show that the Supreme Court of Virginia's decision on the merits was either contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in that proceeding. 28 U.S.C.A. § 2254(d)(1), (2). Further, I must presume that the court's determination was correct unless Bell presents clear and convincing evidence to the contrary. 28 U.S.C.A. § 2254(e)(1). I find that Bell fails to meet this burden. The Virginia statute clearly sets out a two-pronged standard under which mental retardation is defined. See Va.Code Ann. § 19.2-264.3:1.1. Bell fails to show that he meets either prong of the statute. He has failed to produce evidence that he has a qualifying IQ as evidenced by the result of a statutorily-accepted test, and has failed to present sufficient evidence showing the required limitations in adaptive behavior. Thus, I find that the court's determination was reasonable, and that Bell has failed to show clear and convincing evidence to the contrary.

Bell has submitted new evidence to this court not considered by the state court. Bell has filed a second affidavit from Dr. Stejskal, the court-appointed psychologist who evaluated Bell prior to trial, in which Dr. Stejskal disagrees with the state court's legal determination of Bell's mental status. Dr. Stejskal disagrees with the court's conclusion that Bell's having owned and driven a car, owned and used a cell phone and pager, and read the Bible regularly precludes a finding that he is mentally retarded. Dr. Stejskal also states that mastery of such routine and everyday tasks is not inconsistent

with a diagnosis of mild mental retardation. Further, Dr. Stejskal points to additional facts provided in the record, including Bell's childhood nicknames, his inability to maintain consistent employment, and his failure to graduate from school as evidence that Bell's intellectual capacity is significantly impaired or below average, and that evaluation for mental retardation is warranted.

Bell has also submitted an affidavit from Dr. George Harris, a forensic psychologist hired by Bell's present habeas counsel, who reported that Bell's performance on the Raven's places Bell "clearly within the range of mental retardation" and that further testing would likely produce the same result. (Harris Aff. ¶ 3, Pet'r's App., Ex 49.) Dr. Harris also criticized the state court's method of reasoning in reaching a conclusion on Bell's adaptive behavior and functioning, indicating that attempts to measure adaptive limitations on an ad hoc basis are "neither clinically appropriate nor scientifically sound." (*Id.* at ¶ 5.)

The state argues that these affidavits, as well as that submitted by Dr. Ruth in support of Bell's petition for rehearing in state court, are foreclosed from my review.

As far as Dr. Ruth's affidavit is concerned, the state cites *Orbe v. Johnson*, 267 Va. 560, 601 S.E.2d 547, 551–52 (2004), for the proposition that new matters raised for the first time in a petition for rehearing in the Supreme Court of Virginia are barred from review and thus the court's denial is based on a independent state procedural ground.

Dr. Harris's affidavit and Dr. Stejskal's second affidavit are in a different procedural posture.

Unlike the Ruth affidavit, the Harris affidavit and the second Stejskal affidavit were never presented to state court but rather were presented for the first time in the petition filed with this court. In response, Bell asserts that he was amply diligent in investigating his mental retardation claim and bringing it to the attention of the court. As evidence, Bell reports that while his petition was before the Supreme Court of Virginia, he moved several times for an evidentiary hearing and for an order permitting mental health experts to be admitted with necessary equipment to the jail where Bell was being housed. Additionally, Bell requested on numerous occasions appointment of mental health clinicians for a mental retardation determination, and leave to engage in further discovery. The Virginia court denied all of Bell's motions. After the court dismissed Bell's petition, Bell moved for rehearing, requesting again appointment of an expert and an evidentiary hearing to determine mental retardation, all of which were denied by the court. Bell asserts that because he is indigent, he was unable to procure for himself the necessary means for conducting a full evaluation for mental retardation and that in repeatedly requesting, and being denied, financial assistance, he was diligent.

However, even were I to excuse the procedural defaults urged by the state, and consider all three affidavits, the evidence is insufficient to entitle Bell to relief or even to a hearing in this court. I find that the totality of the evidence fails to support a finding that he is mentally retarded under the Virginia statute. While Bell asserts that he has scored below the required threshold on a Raven's IQ test, that test is not among those approved by the Virginia statute.

See Va.Code Ann. § 19.2-264.3:1.1. Further, Bell has failed to present adequate evidence regarding impairment in his cognitive functioning and adaptive behavior, as is also required under the statute.

Accordingly, this claim will be denied.

D. CLAIM IV—INEFFECTIVE ASSISTANCE OF COUNSEL.

In his fourth claim for relief, Bell contends that he was denied his Sixth Amendment right to the effective assistance of counsel during his trial and sentencing. Specifically, Bell claims that his trial counsel were ineffective in that they (1) failed to investigate or present evidence in mitigation during sentencing, (2) failed to advise Bell that he had the right to testify during sentencing, (3) could not understand Bell due to his strong Jamaican patois and mild mental retardation, (4) failed to challenge the sufficiency of the evidence, and (5) failed to object to improper argument by the prosecution. In order to establish an ineffective assistance of counsel claim with respect to each of these alleged failures, Bell must show both that his counsel were deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel is deficient if "counsel's representation fell below an objective standard of reasonableness" as measured by prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052. Except in certain limited contexts not relevant to Bell's claims in which prejudice is presumed, a deficiency is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

1. MITIGATION EVIDENCE.

First, Bell claims that trial counsel were ineffective in that they failed to investigate or present evidence in mitigation during sentencing. Bell presented this claim to the state habeas court, and the Supreme Court of Virginia found that it met neither the performance or the prejudice prong of *Strickland*. *Bell II*, slip op. at 7–10. Under § 2254(d), Bell is entitled to relief only if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence before the state court. *See* 28 U.S.C.A. § 2254(d)(1), (2).

It is well settled that defense counsel must conduct a reasonable investigation into a capital defendant's background prior to the penalty phase of trial, and any failure to present mitigation evidence cannot be justified as a tactical decision unless this duty to investigate has been discharged. *See Wiggins v. Smith*, 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Bell argues that his trial counsel's investigation into potential mitigating evidence did not meet this reasonableness test, and the evidence of record tends to support his contention.

Lloyd Snook, who was appointed as Bell's counsel after one of the originally appointed attorneys promptly withdrew, candidly asked to withdraw from Bell's case shortly before the first scheduled trial date because he had "dropp[ed] the ball" in

preparing Bell's case for trial. (II J.A. at 801.) In a hearing on Snook's motion to withdraw and an accompanying motion for continuance, cocounsel Jud Fischel explained that he had "placed great faith in ... Mr. Snook" and "just blindly thought everything was going along fine" but in reality Snook had developed "no mitigation evidence." (*Id.* at 790.) The court found that "mitigation evidence which can be crucial ... has not been developed," and thus granted the continuance. (*Id.* at 798–99.) Subsequently, the court granted Snook's motion to withdraw and appointed Mark D. Williams as cocounsel. (*Id.* at 815.)

Williams, who was "not on the list for capital defense attorneys" and had never before handled a capital case, was primarily responsible for preparing and presenting the defense case at sentencing. (*Id.* at 796–97; M. Williams Aff. ¶ 1, Pet'r's State App. Ex. 20.) Williams admits that "[a]fter interviewing Mr. Bell, his sisters and his mother [he] concluded that there was little evidence that would assist in mitigating the case against Mr. Bell." (M. Williams Aff. ¶ 7, Pet'r's State App., Ex. 20.) Williams further conceded that he "did not request any documents regarding Mr. Bell, such as education, medical or employment records, and [he] did not seek such information through interviews." (*Id.* at ¶ 8.)

Marie Deans, a mitigation investigator hired to work on Bell's case, provides further evidence of deficiencies in defense counsel's investigation. Deans was appointed to Bell's case in February of 2000, and shortly thereafter interviewed Bell. (Deans Aff. ¶¶ 5–6, Pet'r's State App., Ex. 17.) Deans noted that "it was clear that something was wrong with [Bell's] cognitive abilities" and suspected

some "neurological damage." (*Id.* at ¶¶ 8–9.) Deans told Snook of these findings and asked him "many times to [give to her] phone numbers and addresses for Mr. Bell's family so that she could begin [her] investigation," but Snook never responded. (*Id.* at ¶¶ 10–12.) Sometime later, Deans received a letter from Fischel's office requesting her contact information and she "called back providing it," but she never heard from Bell's defense counsel again. (*Id.* at ¶ 14.) Deans has "worked on over 200 capital cases as a mitigation investigator," and noted that "[r]egarding trial counsel and the mitigation investigation, this was the most disorganized case that [she has] ever attempted to work on." (*Id.* at ¶¶ 1, 15.)

Bell argues that had his trial counsel investigated his criminal history, they would have found that he had no prior incarcerations and that all of his prior convictions were essentially non-violent. Namely, they included several misdemeanors, a conviction for concealing a gun that he was otherwise lawfully permitted to carry, and one minor assault conviction in Jamaica where he tore another man's shirt. Bell further argues that had defense counsel properly investigated his background, they would have found that Bell had witnessed a number of traumatic violent events in Jamaica; he was known as "Slow"; he did not graduate from high school; and he had difficulties remaining employed. Affidavits from Bell's aunt and ex-wife that were presented to state habeas counsel provide evidence of Bell's mental limitations. (Dermod Aff. ¶¶ 3, 5; B. Williams Aff. ¶¶ 8, 9, 10, 12–14, Pet'r's State App., Ex. 25, Ex. 1.) The affidavit from Bell's ex-wife further states that she

was never interviewed by Bell's trial counsel, but she would have testified that Bell was a loving and caring father who had an excellent relationship with his daughter. (B. Williams Aff. ¶¶ 4–5, 11, Pet'r's State App., Ex. 1.)

Tracy Nicholson, the mother of three of Bell's children, stated in an affidavit presented to the state habeas court that Bell's trial counsel interviewed her twice "but only to help them with little stuff, like how to find witnesses." (T. Nicholson Aff. ¶ 2, Pet'r's State App., Ex. 2.) She further noted that Bell was a loving father, that he worked a full-time job to support his children, and that he had never been violent with either her or the children. (*Id.*) Similarly, Joanne Nicholson, the grandmother of three of Bell's children, stated in an affidavit that Bell had lived with her for over two years, that Bell was never violent with Tracy, and that he had a loving relationship with his family. (J. Nicholson Aff. ¶ 2, Pet'r's State App., Ex. 3.) The testimony of both Tracy and Joanne Nicholson could also have rebutted the testimony of Billie Joe Swartz. (*Id.*; T. Nicholson Aff. ¶ 2, Pet'r's State App., Ex. 3.) Dawn Jones, Bell's girlfriend when he first arrived in the United States and mother of one of his daughters, also stated in an affidavit that Bell was a loving and affectionate father, and noted that Bell had sat by his premature daughter's bedside for days after she was born. (D. Jones Aff. ¶¶ 3, 4, 11, Pet'r's State App., Ex. 4.) Dawn Jones was never interviewed by Bell's trial counsel. (*Id.* ¶ 7.) In addition to all of these affidavits averring that Bell was a good father, Bell also notes that his trial counsel could have proven his loving relationship with his children directly to the jury by either calling the children as

witnesses or introducing the many cards his children sent to him while he was incarcerated.

Despite all of this potential mitigation evidence,[17] the mitigation case put forth by Bell's trial counsel consisted of only two witnesses, Bell's sister and father, who testified collectively for less than seven pages of transcript. The Supreme Court of Virginia found that "counsel introduced evidence of [Bell's] background and family life and such evidence was heard by the jury through [Bell's] sister and father," *Bell II*, slip op. at 8, but the sentencing phase transcript shows that the testimony of these two witnesses did not focus on Bell. Trial counsel did not ask Bell's sister or father a single question about Bell's background, his relationships with his family, his children, or any other potentially mitigating factors. (VII J.A. at 2910–16.) In closing argument, the prosecutor noted that Bell had not "produced one shred of evidence of mitigation," and continued that "[t]here has been no evidence presented by the Defense, or though any other witness in this case in mitigation." (VII J.A. at 2925, 2927.) Moreover, defense counsel stated in closing argument that "[t]he testimony that was offered was very graphic about a violent man. We

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[17] In addition to the evidence set forth above, Bell also presented for the first time in his federal habeas petition two new affidavits from Terry and Starks-Cadet as well as a letter from Enos Davenport, one of Bell's fellow inmates, setting forth more potential mitigation evidence in support of his claim. The state argues that this newly-presented evidence is foreclosed from federal habeas review under § 2254(e)(2). Because I find that this new evidence is not critical to my decision on this claim, I need not address the state's argument.

didn't rebut it. Not try to defend it, refute it. We didn't." (VII J.A. at 2930.)

The Supreme Court of Virginia found, and the state now argues, that defense counsel's failure to present the potentially mitigating evidence set forth by Bell was a strategic decision. *Bell II*, slip op. at 8–10. However, this overlooks the fact that defense counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). It is true that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," but Bell presents evidence that defense counsel Williams abandoned his investigatory efforts without such justification. *Rompilla v. Beard*, — U.S. —, —, 125 S.Ct. 2456, 2463, 162 L.Ed.2d 360 (2005). If trial counsel indeed failed to make a reasonable investigation, then an informed tactical decision would be rendered impossible. *See Wiggins*, 539 U.S. at 522, 123 S.Ct. 2527. Furthermore, contrary to the Supreme Court of Virginia's findings, it is far from clear that the potential mitigation evidence proffered by Bell was the type of double-edged evidence that courts have found reasonable to exclude from mitigation cases.

Therefore, in light of Bell's properly supported allegations of weakness in defense counsel's investigation and availability of potential mitigation evidence, I find Bell has presented a colorable claim that the Supreme Court of Virginia's decision denying this claim was an unreasonable determination of the facts in light of the evidence before it and an unreasonable application of the *Strickland*, *Williams*, *Wiggins*, and *Rompilla* line of

Supreme Court precedent. See § 2254(d). However, I will refrain from making a final ruling on this issue until an evidentiary hearing is held and the relevant issues are developed more fully. Because Bell diligently developed the factual basis of this claim in state court, an evidentiary hearing is not barred by § 2254(e)(2). Bell's allegations of trial counsel's insufficient investigation and overlooked mitigation evidence constitute "facts that, if true, would entitle him to relief," *McCarver v. Lee*, 221 F.3d 583, 598 (4th Cir.2000), and it appears from the record that "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Thus, I find that Bell is entitled to a hearing on this claim. *See Fullwood v. Lee*, 290 F.3d 663, 681 (4th Cir.2002).

2. RIGHT TO TESTIFY.

Next, Bell claims that his trial counsel were ineffective in failing to inform Bell that he had a right to testify during the penalty phase. Bell contends that if he had been informed of his right to testify, he would have told the jury about his relationship with his children and expressed sympathy for Timbrook's family. Bell presented this claim in his state habeas petition, and the state court found that it was without merit. Specifically, the Supreme Court of Virginia found that Bell was aware of his right to testify at the trial's sentencing phase and that the claim therefore satisfied "neither the 'performance' nor the 'prejudice' prong of the two-part test enunciated in *Strickland*." *Bell II*, slip op. at 10. Bell is thus entitled to habeas relief only if the state court decision was contrary to, or involved an unreasonable application of, clearly established

federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C.A. § 2254(d)(1), (2).

It is well established that a criminal defendant has a constitutional right to testify on his own behalf, and trial counsel's responsibility to inform the defendant of this right is a component of effective assistance. *See Daniels v. Lee*, 316 F.3d 477, 490, 491 (4th Cir.2003). However, the Supreme Court of Virginia specifically found that Bell was aware of his right to testify at the trial's sentencing phase, and Bell has failed to present any clear and convincing evidence to rebut the presumption of correctness afforded to this factual finding under § 2254(e)(1). Therefore, his claim that his lawyers were ineffective in failing to inform him of his right to testify must fail under *Strickland*. *See Daniels*, 316 F.3d at 491.

In his state habeas case, Bell presented the affidavits of his two trial attorneys. Admittedly, one attorney noted that he could not specifically recall whether he informed Bell of his right to testify during the sentencing phase. However, the other attorney stated that, although he did not advise Bell on his right to testify at the punishment phase of trial, he did tell Bell before trial that he could testify. Furthermore, the record demonstrates that Bell was present both when his attorneys questioned the prospective jurors about Bell's right to testify and when his attorneys argued to the trial court that Bell might testify during the sentencing phase. Based on this evidence, the state habeas court found that Bell was aware of his right to testify during the entire trial, and that he had waived that right. Therefore, the state habeas court concluded that Bell failed to

demonstrate deficient performance on the part of his counsel and failed to show any prejudice resulting from the alleged error.

In assessing the reasonableness of the Supreme Court of Virginia's decision on this claim, I find that *Daniels* is controlling. The petitioner in *Daniels* claimed that he was unaware of his right to testify at sentencing and that his lawyers were ineffective in failing to make him aware of this right. *Daniels*, 316 F.3d at 490. Affidavits from Daniels' attorneys stated that they advised Daniels of his right to testify during the guilt phase of the trial but could not recall advising Daniels of his right to testify in the sentencing phase. *Id.* The record in *Daniels* also reflected that Daniels was present during the voir dire proceedings when his attorneys questioned prospective jurors about Daniels' right to testify and that Daniels had at one time expressed a desire to testify during the guilt phase of his trial. *Id.* Furthermore, Daniels was present at the outset of sentencing when the trial court advised that Daniels' leg irons would not be displayed in the presence of the jury if Daniels decided to testify. *Id.* at 490–91.

The North Carolina equivalent of a state habeas court relied on this evidence in finding that Daniels was indeed aware of his right to testify during the entire trial and that he had waived that right. *Id.* at 491. On federal habeas review, Daniels did not provide the district court with any evidence to rebut the state court's findings other than an after-the-fact denial of any awareness of his right to testify; therefore, the Fourth Circuit found that Daniels failed to offer any clear and convincing evidence to displace the state court's finding that Daniels was aware of his right to testify in the trial's sentencing

phase. *Id.* Accordingly, the Fourth Circuit held that Daniels' "contention that his lawyers were ineffective in failing to inform him of his right to testify must fail." *Id.*

Bell's case cannot be distinguished from *Daniels* in any meaningful way. The evidence relied on by the Supreme Court of Virginia in finding that Bell was aware of his right to testify at the sentencing phase is analogous to that relied on by the state court in *Daniels*. Although Bell did present evidence to this court regarding his alleged difficulty in understanding English, which is slightly more than the "general after-the-fact denials" of the awareness of the right to testify that were submitted to the district court in *Daniels*, I nonetheless find that it does not amount to the "clear and convincing evidence" necessary to overcome the presumption of correctness afforded the state court findings. See 28 U.S.C.A. § 2254(e)(1). Accordingly, I also find that the Supreme Court of Virginia's conclusion that Bell's right-to-testify claim satisfied neither the performance nor the prejudice prong of *Strickland* was not unreasonable under § 2254(d) and deny relief.

3. FAILURE TO UNDERSTAND BELL.

Bell did not present his next claim, that trial counsel were ineffective due to an alleged failure to understand Bell, to the Supreme Court of Virginia; therefore, I find that it is barred from federal habeas review. Indeed, the petitioner concedes that this claim is procedurally defaulted in his brief in opposition to the state's motion to dismiss the federal habeas petition. It cannot be said that Bell's state habeas counsel was diligent in developing this

claim, given that Bell's thick Jamaican patois and intellectual infirmities have existed throughout Bell's trial, appeal, and post-conviction proceedings, and given that these problems would have been readily discernable to Bell's state habeas counsel. It is also clear that Bell cannot make the more stringent showing necessary when a petitioner has failed to develop his claim. Thus, this claim is defaulted.

4. SUFFICIENCY OF THE EVIDENCE.

In his next allegation of ineffective assistance, Bell contends that trial counsel were deficient in failing to challenge the sufficiency of the evidence against him during the guilt phase of his trial. Specifically, Bell argues that trial counsel should have argued that the evidence did not establish that Bell knew, as is required in order to be convicted of capital murder, that Timbrook was a law enforcement officer and that Bell killed Timbrook in order to interfere with his official duties. *See* Va.Code Ann. § 18.2 31(6). Bell further argues that trial counsel were ineffective in failing to present evidence that, because Bell allegedly could not have recognized Timbrook, the shooting was not premeditated. Bell presented this claim in his state habeas proceeding, and the Supreme Court of Virginia found that it failed both the performance and the prejudice prong of the two-part test set forth in *Strickland*. *Bell II*, slip op. at 28–29. Because the state court adjudicated this claim on the merits, Bell is entitled to relief only if he satisfies the conditions set forth in 28 U.S.C.A. § 2254(d).

The Supreme Court of Virginia correctly identified *Strickland* as the law governing ineffective

assistance of counsel claims, thus I must now decide whether its application of *Strickland* to Bell's claim regarding trial counsel's alleged failure to object to the sufficiency of the evidence was unreasonable. In order to constitute an unreasonable application of *Strickland*, the state court's determination on this claim must have been more than incorrect or erroneous; it must have been objectively unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 520–21, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Williams v. Taylor*, 529 U.S. at 409, 120 S.Ct. 1495).

Eyewitness testimony at trial refuted the contention that Bell did not know that Timbrook was a police officer. Brad Triplett testified that he heard Timbrook shout "stop running, police!" at least twice while chasing Bell. (V J.A. at 1908.) A neighbor also testified that he heard Timbrook say "stop, police" as Timbrook and Bell ran by the neighbor's porch. (V J.A. at 1963.) Given this credible evidence indicating that Bell did know Timbrook was a police officer, it does not seem objectively unreasonable for Bell's trial counsel to refrain from arguing to the contrary. Furthermore, as the Supreme Court of Virginia noted in its opinion, the crux of the defense theory was that Bell was not the shooter. In light of this defense strategy, it would have been unwise for trial counsel to have argued to the jury in the alternative that, if they found that Bell had shot Timbrook, he had done it without premeditation. Therefore, I find that the Supreme Court of Virginia's decision that Bell's trial counsel was not deficient in this regard was reasonable, and I must deny habeas relief on this ineffective assistance claim.

5. CLOSING ARGUMENTS.

Lastly, in a footnote, Bell claims that his trial counsel were also ineffective in that they failed to object to an allegedly improper closing argument made by the prosecution during the sentencing phase.[18] In pertinent part, the prosecutor stated:

> This is not an individual, ladies and gentlemen, who has produced one shred of evidence of mitigation.
>
> ... .
>
> ... There is no mitigation evidence in this case, ladies and gentlemen. There is no mitigation evidence in this case. There has been no evidence presented by the Defense, or through any other witness in this case in mitigation.
>
> . . . .
>
> ... There is not one shred of evidence in this case in mitigation. If there were, I would point it out to you, because that is my duty

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[18] In his initial habeas petition filed on May 17, 2005, Bell also alleged that trial counsel were inefficient in failing to make several other objections. Specifically, Bell claimed trial counsel were deficient in failing to challenge the connection between the bullet and the gun; failing to object to evidence of the alleged relationship between Timbrook and Bell; failing to object to the prosecution's argument that Bell was singing along to a rap song; and failing to object to the prosecution's improper bolstering of witnesses and improper suggestion that Bell carried the burden of proof to avoid the death penalty. (Original Pet. at 114–15.) Because Bell did not raise these alleged deficiencies in his amended petition, these claims of ineffective assistance have been withdrawn and are no longer before the court.

> as well, as a member of the Bar. It is not here, ladies and gentlemen. It is not here.

(VII J.A. at 2925, 2927, 2938.) Bell claims that this argument constituted impermissible vouching and that it contained a false statement of law.

Bell presented this claim in his state habeas petition, and the Supreme Court of Virginia found that Bell's trial counsel was not ineffective under *Strickland* because "the trial court made it clear to the jury that counsel's closing argument was not evidence." *Bell II*, slip op. at 30. Because I find that the state court's adjudication of this claim was not unreasonable under § 2254(d), I must deny relief.

It is true that a prosecutor's improper closing argument may constitute a denial of due process if it renders the proceeding "fundamentally unfair." *Bennett v. Angelone*, 92 F.3d 1336, 1345 (4th Cir.1996) (internal quotations omitted). Furthermore, a defense counsel's failure to object to such prosecutorial misconduct can amount to ineffective assistance of counsel under *Strickland*. However, in the instant case, the challenged argument did not violate due process, and thus trial counsel were not deficient under *Strickland* for failing to object.

In order for a defendant's due process rights to be violated by a prosecutor's closing argument, the prosecutor's remarks must (1) be improper and (2) "so prejudice[ ] the defendant's substantial rights that the defendant [is] denied a fair trial." *United States v. Morsley*, 64 F.3d 907, 913 (4th Cir.1995). Arguments typically deemed improper involve situations in which a prosecutor "express[es] his or her personal belief or opinion as to the truth or

falsity of any testimony or evidence or the guilt of the defendant," "intentionally [ ] misstate[s] the evidence or mislead[s] the jury as to the inferences it may draw," or makes an argument "calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice 3-5.8 (3d ed.1993) (second edition cited with approval by the Supreme Court in *United States v. Young*, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Although "[t]he line separating acceptable from improper advocacy is not easily drawn," it is clear that the prosecutor's argument in this case was within acceptable bounds. *Young*, 470 U.S. at 7, 105 S.Ct. 1038.

Here, the prosecutor merely commented on the dearth of mitigation evidence presented by the defense during the sentencing phase in Bell's trial. Indeed, Bell's primary argument for the ineffective assistance of counsel is that trial counsel failed to investigate and present mitigation evidence. Petitioner concedes that "the evidence presented in so-called 'mitigation' at sentencing was not even connected to Bell himself." (Pet. at 117.) Therefore, the challenged argument was not improper, and Bell's trial counsel were not deficient for failing to object. Moreover, the ultimate question is not whether the prosecutor's argument was actually improper. *See Bennett v. Angelone*, 92 F.3d 1336, 1349 (4th Cir. 1996). Because "refraining from objecting to avoid irritating the jury is a standard trial tactic," I find that trial counsel in the instant case would not be deficient under *Strickland* in any event. *Id.* Furthermore, even if this argument was improper, Bell did not suffer any prejudice as a result. The prosecutor's comments did not "so infect[ ] the [proceeding] with unfairness as to make

the resulting [sentence] a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The Supreme Court of Virginia found that "the trial court made it clear to the jury that counsel's closing argument was not evidence," and thus any risk of undue prejudice was minimized and petitioner's ineffective assistance claim relating to the closing argument must fail. *Bell II*, slip op. at 30.

E. CLAIM V—FUTURE DANGEROUSNESS.

Bell claims that the jury's assessment of future dangerousness violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and thus entitles him to habeas relief from this court. Bell cites five separate reasons why the jury's assessment regarding future dangerousness was flawed. I review each in turn.

1. PRISON CONDITIONS EXPERT.

First, Bell asserts that the trial court denied him the right to put on evidence at sentencing from a prison expert on prison security and conditions, and thereby violated clearly established Supreme Court precedent and disabled Bell from proving that his imprisonment for life in a "super-max" facility would create no future danger to society. Bell had secured an expert, James E. Aiken, a penologist and prison administrator, and sought to introduce his testimony for the purpose of rebutting the state's evidence of Bell's future dangerousness. The trial court excluded Aiken's testimony as irrelevant to mitigation.

Bell raised this issue in his direct appeal to the Supreme Court of Virginia, which found that the evidence Bell sought to introduce was of the same

kind deemed not relevant to the future dangerousness inquiry in *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001), and *Cherrix v. Commonwealth*, 257 Va. 292, 513 S.E.2d 642 (1999), because it was not specific to Bell's character or history, or the circumstances of the offense. *Bell I*, 563 S.E.2d at 714. In *Cherrix*, the defendant sought to present evidence on prison life and its effect on his future dangerousness through testimony by various experts. *Cherrix*, 513 S.E.2d at 653. The trial court determined that the evidence proffered by the defendant was immaterial to mitigation. *Id.* The defendant argued to the Supreme Court of Virginia that exclusion of the proffered expert testimony was a violation of the Virginia law allowing presentation of mitigating evidence, and a violation of the constitutional right to mitigation evidence. The Supreme Court of Virginia disagreed, finding that the defendant's right to present mitigating evidence does not limit the court's authority to exclude as irrelevant evidence not bearing on the defendant's character, prior record, or circumstances of the offense. *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 605 n. 12, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The court further found that *Cherrix* sought to introduce evidence involving "the general nature of prison life," rather than evidence concerning history and experience particular to the defendant. *Cherrix*, 513 S.E.2d at 653. Because the evidence was not specific to the defendant, but rather reached prison conditions generally, the court found that the trial court had properly excluded it. *Id.*

In *Burns*, the defendant, recognizing that general prison life evidence had been deemed in *Cherrix* immaterial to mitigation, proffered the same

evidence, but for the purpose of rebutting the state's future dangerousness claim. The defendant argued that prison life evidence is material, as prison is the only society to which a capital defendant can pose a "continuing serious threat," and therefore he should be permitted to demonstrate that the threat of criminal acts in the future is severely limited in a maximum security prison. *Burns*, 541 S.E.2d at 893. The court disagreed, reiterating its holding in *Cherrix* that the right to present mitigation evidence does not limit the court's authority to exclude evidence which is immaterial or irrelevant, and holding that the relevant inquiry is not whether the defendant "*could* commit criminal acts of violence in the future, but whether he *would*." *Id.* It determined that evidence regarding the general nature of prison life was not relevant to the particular facts of the defendant's history and background and the circumstances of his offense, even when offered in rebuttal to evidence of future dangerousness. *Id.*

Because this issue was adjudicated on the merits in state court, pursuant to § 2254(d) I may grant relief on Bell's claims only if he shows either that the state court adjudication resulted in a decision that was contrary to or involved an unreasonable application of federal law, as determined by the United States Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. I find that Bell meets neither standard, that the Supreme Court of Virginia's adjudication was reasonable, and that I must deny relief.

First, Bell asserts that Virginia's case law on prison conditions evidence is contrary to clearly established federal law, namely *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Bell is correct in asserting that Supreme Court precedent establishes for capital defendants a right to present mitigating evidence relating to their character, record, or offense to the sentencing body. *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). While Bell characterizes this right as "broad," the Supreme Court has limited permissible mitigation evidence to that which is relevant and related to "a defendant's character or record and any ... circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *see Eddings*, 455 U.S. at 110, 102 S.Ct. 869.

In *Skipper v. South Carolina*, the Supreme Court found a violation of the right to present mitigation evidence where the state court excluded testimony by two jailers and one "regular visitor" that the defendant had made a "good adjustment" to life in jail during his seven months of incarceration. 476 U.S. at 6, 106 S.Ct. 1669. The Court found that such testimony would be "mitigating" in serving as a basis for a sentence less than death, and reasoned that excluding such evidence violated the defendant's right to place mitigating evidence before the sentencer. *Id.* at 5, 106 S.Ct. 1669. Further, the Court in *Skipper* limited its ruling, explicitly stating that it does "not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating." *Id.* at 7 n. 2, 106 S.Ct. 1669.

Bell asserts that the Supreme Court of Virginia's application of *Cherrix* and Burns to his case violates the rule set out in *Skipper*. I disagree, and find that Virginia's rules regarding general prison life evidence fit within the framework established by the cases setting out a defendant's right to present mitigation evidence.

Eddings and *Lockett* permit introduction of mitigation evidence particular to the defendant and his future adaptability. The Court granted relief in *Skipper* because the evidence excluded by the trial court was particular to the defendant and his adjustment to incarceration and was therefore within his constitutional rights to present. The evidence proffered by Bell, conversely, is general evidence related to prison conditions and deals with whether he *could* engage in violent acts while incarcerated. Thus, it falls outside the categories of character, history, or circumstances of the offense. Further, Bell mischaracterizes the Virginia rule, asserting that it "abandoned" the inquiry into actual future dangerousness. On the contrary, the Virginia rule encourages the introduction of such evidence, so long as it deals particularly with the defendant, as required by *Eddings* and *Lockett*. Accordingly, I find that the Supreme Court of Virginia's decision is not contrary to *Skipper v. South Carolina* and that relief would be improper on this claim.

Next, Bell asserts that the Supreme Court of Virginia's application of the rule against prison life evidence in his case violated his right to necessary expert services. Bell asserts that he had a right to rebut the state's evidence of his future dangerousness, and after making a threshold showing was entitled to the assistance of an expert.

Bell correctly asserts that the Supreme Court has recognized that the state, upon request, must provide indigent defendants with "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). It is undisputed that fundamental fairness requires that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). The Supreme Court has also held that one of the basic tools is a due process right to the appointment of a psychiatrist to assist a defendant when he demonstrates that his sanity at the time of the offense will be a significant factor at trial. *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

The law of this circuit, however, does not extend the holding in *Ake* to require appointment of experts for purposes other than a determination of sanity. *See Weeks v. Angelone*, 176 F.3d 249, 265 (1999), *aff'd on other grounds*, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727, *reh'g denied*, 529 U.S. 1013, 120 S.Ct. 1290, 146 L.Ed.2d 234 (mem.) (2000). To apply such a new rule here would violate the prohibition in *Teague v. Lane*, 489 U.S. 288, 311–12, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion) against announcing new rules on collateral review.[19] Because the Fourth Circuit has not recognized the

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[19] In *Teague*, the Supreme Court held in a plurality opinion that new rules will not be announced on collateral review unless they fall into one of two exceptions, neither of which apply here. See 489 U.S. at 311–12, 109 S.Ct. 1060.

extension of *Ake* to other types of experts, and because *Teague* precludes my announcing a new rule on this issue, I must deny Bell's request for relief on this claim.

2. AGGRAVATING FACTORS.

Next, Bell alleges that his death sentence violates the federal Constitution because the indictment failed to include the capital offense aggravating factors. Bell separately contends that his counsel's failure to raise this issue at trial and on direct appeal amounted to ineffective assistance of counsel.

As to Bell's substantive claim, he asserts that the indictment's lack of aggravating factors precludes his sentence of death based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In *Apprendi*, the Supreme Court held that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490, 120 S.Ct. 2348.

Ring involved an Arizona statutory sentencing scheme whereby a death sentence was legally imposed only if at least one aggravating factor was found to exist beyond a reasonable doubt. 536 U.S. at 597, 122 S.Ct. 2428. In the same statutory scheme, the aggravating factors were determined by a judge rather than a jury. *Id.* at 592, 122 S.Ct. 2428. The issue decided in *Ring* was whether the judge-made determination was valid, or whether the Sixth Amendment right-to-trial guarantee as applied to the states by the Fourteenth Amendment required

that the aggravating factor be found instead by a jury. *Id.* at 597, 122 S.Ct. 2428. Citing *Apprendi*, the Court found that because the aggravating factors operated as the functional equivalent of an element of a greater offense, the Sixth Amendment required a jury finding as to that element. *Id.* at 609,122 S.Ct. 2428.

Though *Ring* and *Apprendi* relate to jury trial guarantees, subsequent case law has extended their holdings to require that in the context of federal prosecutions the indictment must include all issues to be determined by a jury. *See United States v. Higgs*, 353 F.3d 281, 299 (4th Cir.2003). Bell appears to argue that there is a federal constitutional right requiring state capital indictments to include aggravating factors and that because his charging indictment failed to allege future dangerousness or any other aggravating factors, he is entitled to habeas relief.

Bell presented this claim to the Supreme Court of Virginia on state habeas review. That court held the substantive claim to be procedurally defaulted because the issue was neither raised at trial nor on direct appeal. *Bell II*, slip op. at 21. The court found that it was not a cognizable claim on a petition for habeas corpus, citing *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, 682 (1974), which prohibits state habeas review of claims that were available to the petitioner at trial or on direct appeal but were not raised at that time.

In *Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir.1998), the Fourth Circuit held that a federal habeas court may not question a state court's application of a state procedural rule because a state court's finding of procedural default is not

reviewable so long as it was based upon an adequate and independent state law ground. In this case, the Supreme Court of Virginia's application of *Slayton*'s procedural default rule provides an adequate and independent state law ground upon which to deny relief on federal habeas review, barring cause and actual prejudice or a miscarriage of justice. *See Mu'min v. Pruett*, 125 F.3d 192, 196–97 (4th Cir.1997) (rejecting petitioner's argument that procedural default rule in *Slayton* does not bar consideration of claims because rule is not independent of federal law).

To show cause, the petitioner must demonstrate some objective factor external to his defense that impeded counsel's efforts to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). To demonstrate prejudice, a defendant must show not merely that there was a possibility of prejudice, but that the error worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional magnitude. *Id.* at 494, 106 S.Ct. 2639. Here, because I find that Bell fails to produce adequate justification for the assertion that he was prejudiced by failing to raise this claim, I will not reach his arguments regarding cause.[20]

The Virginia statutory sentencing scheme does not contain infirmities parallel to those in the

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[20] Bell appears to argue that because *Ring* was decided after his trial and direct appeal, that the legal basis for his argument was not available. While this may be the case, a defendant must show both cause and prejudice to succeed on his petition for relief. *See Murray*, 477 U.S. at 494–95, 106 S.Ct. 2639. Bell is unable to do so.

Arizona statutes as found by the Supreme Court in *Apprendi* and *Ring*. In Virginia, if the defendant elects a jury trial, as Bell did here, the existence of an aggravating factor, here, future dangerousness, is submitted to a jury in conformity with Sixth Amendment guarantees. Bell, however, asserts that the indictment in his case was defective for failure to set out the aggravating factors upon which the state would seek the death penalty. However, states are not currently bound by the federal Constitution to proceed in felony cases by way of indictment. *See Muhammad v. Commonwealth*, 619 S.E.2d 16, 39 (Va. 2005). Even if Bell had raised this claim at trial and on direct appeal, he has no meritorious constitutional claim regarding the state's failure to include the aggravating factor in the capital murder indictment because proceeding by indictment is not constitutionally required of the states. *See Id.*

Further, as the Supreme Court of Virginia noted in denying relief in Bell's state habeas petition, Virginia law provides that if the indictment gives a defendant notice of the nature and character of the offense charged sufficient to make his defense, no bill of particulars is required. *Roach v. Commonwealth*, 251 Va. 324, 468 S.E.2d 98, 107 (1996), *overruled on other grounds by Morrisette v. Warden*, 270 Va. 188, 613 S.E.2d 551 (2005). In fact, the Supreme Court of Virginia has held that an indictment reciting an offense under Va.Code Ann. section 18.2-31, as did Bell's, was sufficient to place the defendant on notice of the nature and character of the offense. *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d 114, 123 (1996), *abrogated on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir.

2000). Therefore, Bell was given adequate notice under Virginia law.

Because it is clear that Bell suffered no prejudice by not having raised the substantive *Apprendi/Ring* claim at trial or on direct appeal, I find that his claim is procedurally defaulted in this court. Accordingly, I deny relief.

Bell asserts separately that his counsel were ineffective in failing to raise the *Apprendi* and *Ring* issues at trial or on direct appeal. On state habeas review, the Supreme Court of Virginia held that Bell's claim met neither the "performance" nor the "prejudice" prong of the *Strickland* test. *Bell II*, slip op. at 21–22; *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It reasoned first that because *Ring* and *Apprendi* have been held not to apply to the states through the Fourteenth Amendment, raising those claims would have proved fruitless and thus not prejudicial under *Strickland*. Further, the court referred to its previous holding that capital defendants are not entitled to bills of particulars setting out the intended aggravating factors when the indictment specifying the crime gave the defendant specific notice of the nature and character of the offense. *Roach*, 468 S.E.2d at 107.

As previously explained, the Sixth Amendment guarantees the effective assistance of counsel. In order to establish an ineffective assistance of counsel claim, Bell must show both that his counsel were deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel is deficient if "counsel's representation fell below an objective standard of reasonableness" as measured

by prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052. Except in certain limited contexts not relevant to Bell's claims in which prejudice is presumed, a deficiency is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

For the reasons stated above, there is no reasonable probability that raising an *Apprendi/Ring* claim at trial or on direct appeal would have changed the outcome of the proceeding, because that claim would have been found not meritorious under existing Virginia law. Thus, Bell fails to show the prejudice prong under *Strickland*. Accordingly, I must deny habeas relief.

3. JURY QUESTION ON EARLY RELEASE.

Bell next argues that he is entitled to habeas relief because the state court acted contrary to or unreasonably applied clearly established federal law in responding to a jury question regarding whether, other than parole, there was any other way in which the defendant could be released from a life sentence. Bell alleges that the trial court's response violated his due process rights pursuant to *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

At Bell's trial, during penalty phase deliberations, the jury inquired, "[u]nderstanding that imprisonment for life means no possibility of parole, is there any other way to be released from prison?" (VII J.A. at 2951.) The court's first proposed answer to the jury was, "No. Not when the Defendant has been convicted of capital murder."

(*Id.* at 2952.) The state objected to the proposed instruction, however, on grounds that it failed to take into account the possibility of executive pardon or clemency. The court then reasoned that rather than open the door to inappropriate jury speculation on pardon or clemency (which may have resulted in a harsher penalty), it decided to simply direct the jury to rely on the instructions already presented to it. (*Id.* at 2953.) Included in those instructions was the following: "The words 'imprisonment for life' mean imprisonment for life without possibility of parole." (I J.A. at 447.) Bell argues that by failing to directly answer the jury's question, the trial court allowed the jury to speculate that Bell might be eligible for some form of early release.

The Supreme Court of Virginia addressed this claim on direct appeal. *See Bell I*, 563 S.E.2d at 716–18. The court held that the instruction was sufficient to meet Simmons' due process requirements. *Id.* The court noted that had the jury made a more specific inquiry regarding a particular form of early release, such as geriatric release, it could have safely given a more direct answer. It reasoned that the general nature of the jury's question precluded giving a detailed answer. *Id.* Because this claim was adjudicated on the merits, as set out in § 2254(d)(1), I may grant relief only if the state court acted contrary to or, as Bell asserts, unreasonably applied clearly established federal law. For the following reasons, I find that relief is not warranted.

In *Simmons v. South Carolina*, the Supreme Court of the United States took up the case of a defendant who, having previously pleaded guilty to

two violent offenses,[21] was rendered ineligible for parole under South Carolina law. 512 U.S. 154, 156, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). During the capital trial, in accordance with prosecution motions, the court ordered the defense barred from asking any voir dire questions regarding parole, and refused to instruct the jury on the definition of "life imprisonment" under state law. *Id.* at 156–57, 114 S.Ct. 2187. In denying the instruction, the trial judge indicated a willingness to offer the proposed instruction were the jury to ask specific questions regarding parole ineligibility. *Id.* at 160, 114 S.Ct. 2187. However, the trial judge failed to give such an instruction upon an identical question by the jury, and also instructed the jury that parole "is not a proper issue for your consideration," thereby implying that the defendant might be paroled. *Id.* at 160, 114 S.Ct. 2187. The jury returned a sentence of death twenty-five minutes later. *Id.*

The Supreme Court held that concomitant with the jury's consideration of evidence regarding the defendant's future dangerousness is a defendant's due process right to present evidence related to the "actual duration" of a defendant's prison sentence. *Id.* at 163, 114 S.Ct. 2187. Thus, the court's refusal to allow the defendant to present evidence regarding

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[21] The defendant beat to death an elderly woman in her home. He had pleaded guilty to first-degree burglary and criminal sexual conduct in connection with two prior assaults on elderly women. Evidence presented during the penalty phase indicated that the defendant's history tended to show years of neglect and severe sexual and physical abuse, which were reflected in his violent behavior. Defense and prosecution witnesses agreed that the defendant posed a continuing danger to elderly women.

his parole ineligibility deprived him of due process. *Id.* at 162, 114 S.Ct. 2187.

I find that *Simmons* is not parallel to this case; in fact, the Virginia trial court afforded Bell the very protection guarded by *Simmons* by instructing the jury that life imprisonment is equal to life imprisonment without parole. While the jury's question related to early release based on something other than parole, the judge's reiteration of his previous instruction served to bolster the jury's reliance on the parole ineligible instruction. Any instruction related to non-parole release is outside the scope of *Simmons*' holding. Because the Virginia court instructed the jury regarding Bell's ineligibility for parole, I find that his due process rights were not violated.

Virginia law in many ways tracks Simmons. In *Yarbrough v. Commonwealth*, 258 Va. 347, 519 S.E.2d 602 (1999), the Supreme Court of Virginia held that upon a defendant's request, a trial court must instruct a jury that "life imprisonment" means "imprisonment for life without possibility of parole." *Id.* at 616. The same court in *Fishback v. Commonwealth*, 260 Va. 104, 532 S.E.2d 629 (2000), held that, in fairness to all parties, jurors should be told that, despite the abolition of parole, certain defendants are still eligible for geriatric release. *Id.* at 634; *see also Bell I*, 563 S.E.2d at 717. However, because geriatric release is in "the nature of parole," jurors determining a sentence for defendants ineligible for geriatric release should be told only of the defendant's ineligibility for parole generally. *Id.* It is clear from the record that the Virginia court properly instructed the jury in accordance with *Simmons*, and that there is no evidence supporting

Bell's claim that the Virginia court acted contrary to or unreasonably applied existing law regarding jury instruction on parole ineligibility. Thus, I deny relief on this claim.

4. FUTURE DANGEROUSNESS AGGRAVATOR AS UNCONSTITUTIONAL.

Next, Bell asserts that the Virginia statute making future dangerousness an aggravating factor in capital cases is unconstitutional. Bell asserts three bases for his claim. Bell argues that the statutory scheme is unconstitutional because it permits the introduction of unadjudicated bad acts, because it is impermissibly vague, and because of the holding in *Ring v. Arizona*. I analyze each argument in turn, and deny relief on all claims.

Imposition of the death penalty in Virginia is predicated on proof beyond a reasonable doubt of at least one of two aggravating factors as set out in the Virginia Code. Bell was sentenced to death under the future dangerousness factor, under which the state must prove beyond a reasonable doubt "a probability ... that [the defendant] would commit criminal acts of violence that would constitute a continuing serious threat to society." Va.Code Ann. § 19.2-264.4(c) (Michie 2004).

Bell first objects because jurors are permitted to consider evidence of unadjudicated bad acts in determining future dangerousness. Bell argues that any bad acts not previously adjudicated beyond a reasonable doubt must be proved beyond a reasonable doubt in order to be considered by the jury. Virginia law allows the prosecutor to introduce to the jury evidence of unadjudicated bad acts during the penalty phase of the trial, in order to establish

that the defendant is a probable future threat of harm to society under the statute. Bell asserts that the Supreme Court of Virginia's denial of relief constituted an unreasonable application of clearly established federal law.

The Supreme Court of Virginia on direct appeal summarily rejected Bell's claim holding it unmeritorious under existing state case law. *Bell I*, 563 S.E.2d at 715. Bell again raised this issue at the state habeas level, apparently merged with claims alleged separately here. *Bell II*, slip op. at 22. The Supreme Court of Virginia, on state habeas review, held that Bell's claim regarding unadjudicated bad acts was procedurally defaulted for failure to raise it at trial or on direct appeal. *Id.* at 23. However, this was erroneous. The Supreme Court of Virginia did indeed address Bell's unadjudicated bad acts claim on direct appeal, though summarily. *Bell I*, 563 S.E.2d at 715 ("Bell contends that the admission of evidence regarding unadjudicated criminal conduct during the penalty phase of his trial violated his [constitutional rights] .... Bell presents no compelling reason why we should depart from our prior rulings [decided adversely to Bell's position]."). As such, I will treat this portion of the claim as having been adjudicated on the merits in state court, and will grant relief only if I find that the Virginia courts acted contrary to or unreasonably applied clearly established federal law under § 2254(d)(1). I find that is not the case here, and deny relief.

Courts and juries have routinely considered evidence of prior unadjudicated bad acts in assessing future dangerousness. *See Eaton v. Angelone*, 139 F.3d 990, 998 (4th Cir. 1998) (citing Supreme Court and Fourth Circuit cases upholding sentences based

on unadjudicated prior bad acts, and finding the practice permissible). The Supreme Court has determined that a sentencing jury must have before it all information relevant to its determination and be left to weigh the evidence as it sees fit, as only the fact finder has the benefit of cross-examination and contrary evidence by the opposing party. *See Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

Relatedly, the Fourth Circuit has applied *Jurek v. Texas* to approve the constitutionality of an aggravating scheme "identical" to Virginia's. *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir.1984). It has also upheld the use of a wide range of evidence relevant to the future dangerousness inquiry. *See Giarratano v. Procunier*, 891 F.2d 483, 489–90 (4th Cir. 1989). Thus, the Supreme Court of Virginia followed existing, clearly established federal law in denying Bell relief on his claim that the introduction of unadjudicated bad acts resulted in a violation of his constitutional rights. Because there is no contravention or unreasonable application of clearly established federal law, I deny relief.

Bell next argues that the aggravating factor of future dangerousness is unconstitutionally vague in violation of the Eighth Amendment. Bell takes further issue with the fact that the trial court failed to offer a limiting instruction defining certain terms within the jury charge.

On state habeas review, the Supreme Court of Virginia held that Bell's vagueness challenge was barred because the issue was raised and decided both in the trial court and on direct appeal. The court cited *Henry v. Warden*, 265 Va. 246, 576

S.E.2d 495, 496 (2003), for the proposition that claims decided by the trial court and on direct appeal are barred from habeas review.

This court, sitting in habeas review, may not reexamine a determination based only on application of state law. *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). However, where the petitioner's claim concerns a federal constitutional issue, the rule set out in *Henry* does not prevent federal habeas review of the claim. See *Goins*, 226 F.3d at 320 n. 3 (recognizing that the rule in precursor to *Henry* does not prevent federal habeas review of otherwise properly raised claims). Because this claim was adjudicated on the merits in state court, however, I must apply the deferential review set out in § 2254(d), and grant relief only if the state court decision contravened or unreasonably applied clearly established federal law. As above, Bell fails to offer sufficient grounds to afford relief.

In order to impose the death penalty on a defendant, the Supreme Court has held that the trier of fact must convict the defendant of murder and find at least one aggravating factor. *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Further, the Court has held that the aggravating factor must meet two conditions: First, that it apply not to all defendants convicted of murder, but rather to a subclass. *Id.* Second, the aggravating factor must not be unconstitutionally vague, meaning that it is defined in terms too vague to provide sufficient guidance to the sentencer. *Id.* The factor must have "some 'common-sense core of meaning' " that criminal juries may capably understand. *Id.* at 973, 114 S.Ct. 2630 (quoting *Jurek v. Texas*, 428 U.S. 262, 279, 96

S.Ct. 2950, 49 L.Ed.2d 929 (1976)). The Fourth Circuit has found Virginia's sentencing scheme to be constitutional, even in light of a vagueness challenge like the one Bell brings here. *See Briley v. Bass*, 750 F.2d at 1245 ("The constitutionality of [Virginia's future dangerousness aggravator] is beyond question" in light of *Jurek*.). Because Bell presents no compelling reason why, under § 2254(d), I should depart from that ruling, I deny relief.[22]

5. AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT.

Bell's third claim is based on *Ring v. Arizona*, in which the Supreme Court of the United States held that statutory aggravating factors must be found by a jury beyond a reasonable doubt. *See Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Bell argues that the Virginia statute violates *Ring*, in allowing the jury to impose a death sentence upon finding a "probability" of future dangerousness beyond a reasonable doubt, rather than future dangerousness *per se*.

While Bell argues that *Ring v. Arizona* effected a change in the law sufficient to afford relief on his claim in this court, the Supreme Court in *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), determined that under *Teague*, *Ring* was a procedural decision, did not apply

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[22] Bell correctly points out that the Supreme Court of Virginia defined the statutory terms "criminal acts of violence" and "probability" in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978). However, in so doing, the court did not attach a requirement that all juries be apprised of its construction. For the same reason as above, I find that relief on this claim is unwarranted under § 2254(d).

retroactively to cases already decided on direct appeal, and did not announce a watershed rule of criminal procedure. Thus, I may not retroactively apply *Ring* here. As such, I find that the Virginia court did not act contrary to or unreasonably apply clearly established federal law in denying Bell relief on this claim, and I deny relief.

F. CLAIM VI—ALLEGED VIOLATIONS OF BELL'S RIGHT TO TRIAL BY JURY.

Bell alleges numerous instances of juror misconduct which he contends entitle him to habeas relief. Bell asserts that jurors were biased, that they deliberated before the trial was complete, that they slept during the trial, that thirteen jurors deliberated in the guilt phase of trial, and that pretrial publicity and uniformed police spectators violated his right to a fair trial. I review each claim in turn.

1. JUROR BIAS.

Bell first asserts that two of the jurors impaneled at his trial had relationships with the victim's family such that his constitutional right to a fair and impartial jury was violated.

The Sixth Amendment guarantees the accused in criminal prosecutions "the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. This guarantee is applicable to the states through the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Further, the Supreme Court has held that due process requires that a capable and willing jury decide a case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Bell relies on two affidavits by alternate juror Larry J. Miles. In the first, presented to the Supreme Court of Virginia during its habeas review, Miles swore he overheard a conversation between two "older lad[y]" jurors, whose names he cannot recall, discussing their relationship with the victim and his family, and about "knowing the family of the victim ... by their names ... [and] going to church ... and ... on picnics with [the victim]'s family." (Miles Aff. ¶ 4, Pet'r's State App., Ex. 13.) Only one of the seated jurors questioned on voir dire revealed any relation with the Timbrooks that matched the relationship indicated by juror Miles.[23] After the Supreme Court of Virginia indicated doubt about whether the allegedly biased jurors had actually been seated, *Bell II*, slip op. at 13, Bell proffered a second affidavit in this proceeding,[24] conclusively stating that the women in question were seated members of the jury: "[W]hen I said that 'there were two older ladies on the *jury*'–I meant two people who heard the entire trial and deliberated and made a decision on the case." (Miles Aff. ¶ 5, Pet'r's App., Ex. 46.)

During the voir dire portion of the trial, the court and parties were thorough in questioning jurors on

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[23] Juror Mary J. Hutchings revealed a casual relationship with the victim's sister-in-law and that she knew the victim's wife by sight, but reported that she could decide the case without worrying about her acquaintance's reaction upon a finding of "not guilty." (III J.A. 1251–53, 1262–63.)

[24] The state disputes the authenticity of the new Miles affidavit, although the grounds of its objection are not apparent. Accordingly, I assume without deciding that the second document submitted by Miles is, in fact, authentic.

potential relationships with the victim or his family. Potential jurors were asked: "Are you now, or have you at any time in the past, been a friend of any member of Mr. Timbrook's family?" (III J.A. at 1119.) Regarding each witness from the list of potential witnesses read to the jury, the court asked whether any juror was "related to the witness ... or ... otherwise kn[e]w the witness?" (III J.A. at 1120.) Further, the court had the victim's widow, mother, and father each stand during this part of the questioning. Among other things, the jury panel was also asked if any individual had any interest in the outcome of the case or were aware of any bias or prejudice against the defendant.

Bell asserts that the jurors identified by Miles lied during *voir dire* and were unconstitutionally biased against him during trial. The state argues that all jurors having a disqualifying relationship with the victim's family were questioned and excused. It argues that, even assuming that juror Miles' declaration is true, the two unidentified jurors could have answered the questions correctly. Jurors who knew of the Timbrook family, or who may have gone to church or on picnics with the family but who did not know the victim or consider themselves "friends" of the family, were retained and were not unqualified, nor Bell injured by their presence on the jury.

Particularly, Bell asserts three constitutional violations: first, that the jurors' lack of candor or failure to answer questions honestly amounted to actual bias; second, that the jurors' lack of honesty resulted in, at least, implied bias; and third, that because these "tainted" jurors spoke with fellow jurors about their relationship with the victim's

family, Bell's for-cause challenges were unconstitutionally impeded. For these reasons, Bell asserts that he is entitled to habeas relief or, alternatively, an evidentiary hearing.

The Supreme Court of Virginia heard Bell's claim on state habeas review and found it unmeritorious for two reasons: First, because Bell failed to allege whether the women were actually seated on the jury, and second, because the trial court's questioning the entire venire whether any juror had any relationship with any member of the victim's family was sufficient to eliminate any juror bias. *Bell II*, slip op. at 13. The court provided that all potential jurors with such relationships were excused, save one juror who was acquainted with the victim's family but was questioned and deemed fit to serve. *Id.*

Even considering that Miles' new affidavit was not presented to the state court, I find that the correctness of the state court's determination has not been adequately rebutted. There is no indication that the jurors identified by Miles failed to honestly answer the voir dire questions. As argued by the state, they may have only known of the victim's family, without any relationship more than that exhibited by juror Hutchings, who was not disqualified.

Further, even if a writ of habeas corpus is authorized under § 2254(d), a petitioner is not entitled to relief unless he can show "that any constitutional errors committed had substantial and injurious effect or influence on the verdict rendered by the jury." *Wilson v. Ozmint*, 352 F.3d 847, 855 (4th Cir.2003) (internal quotations omitted). I find that Bell's jury bias claim, based on the

circumstances described here, cannot be said to have had such an effect or influence.

2. PREDELIBERATION BY JURORS.

Bell alleges that the court's instructions to the jury failed to make clear to jurors that they were not to discuss the case before hearing all of the evidence, and that he was harmed by the jurors engaging in such predeliberation.

In particular, Bell alleges that the trial court's instructions never fully prohibited the jury from deliberating prior to the close of all the evidence, which resulted in jurors deliberating prematurely, comparing notes with one another, and allowing alternates to deliberate. Bell contends that the court's instructions and the jurors' alleged predeliberation violated his right to an impartial and attentive jury under the Constitution. Bell argues that he is entitled to relief on these grounds. I disagree and deny relief on this claim.

The Supreme Court of Virginia reviewed Bell's claim at the state habeas level, and determined that, although it had been raised and decided at trial, Bell's failure to raise it on direct appeal rendered it procedurally defaulted in that court. *Bell II*, slip op. at 14. In so holding, the court cited *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, 682 (1974), which prohibits state habeas review of claims that were available to the petitioner at trial or on direct appeal but were not raised at that time.

As explained above, *Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir.1998), prohibits my review of a state court's finding of procedural default if it was based upon an adequate and independent state law ground. In this case, the Supreme Court of

Virginia's application of *Slayton*'s procedural default rule provides an adequate and independent state law ground upon which to deny federal habeas relief, barring cause and actual prejudice or a miscarriage of justice. *See Mu'min v. Pruett*, 125 F.3d 192, 196 (4th Cir.1997).

To show cause, the petitioner must demonstrate some objective factor external to his defense that impeded counsel's efforts to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). To demonstrate prejudice, a defendant must show not merely that there was a possibility of prejudice, but that the error worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional magnitude. *Id.* at 494, 106 S.Ct. 2639. Bell claims that his counsel were ineffective at trial in not securing an instruction clarifying the jurors' duty not to predeliberate, and that their ineffectiveness constitutes cause sufficient to overcome the alleged procedural default. Further, Bell alleges that the fact that his claim is meritorious is sufficient to establish prejudice. I disagree with both assertions and deny relief.

Bell asserts that his counsel were unconstitutionally ineffective for failing to secure an instruction clarifying that jurors were not to discuss the case prior to the close of all the evidence. As explained above, to establish ineffective assistance under *Strickland*, Bell must show both that his counsel were deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Bell cannot show either prong. The trial court instructed the jurors not to draw conclusions about

the case prior to the end of trial, not to discuss such conclusions unless all jurors were present and in the jury room together, and that they should keep an open mind and not *decide* any issue until the close of evidence and further instructions from the court. (IV J.A. at 1635.) Just prior to lunch breaks, the jurors were instructed not to discuss the case over lunch, even if they ate with each other, and that deliberations were not to begin yet, and never unless all members were together in the jury room. (V J.A. at 1891–92.) The trial judge further instructed jurors to alert him if *anyone* attempted to discuss the case with them during the lunch break, and to break off the conversation if that did occur. (*Id.*)

At another point in the trial, the court cautioned jurors not to compare notes with one another, and that discussions between jurors should be delayed until "all of the evidence [is] in" and deliberations begin. (VI J.A. at 2321.) It appears that this admonition was prompted by a suggestion that the jurors had been comparing notes with one another. (*Id.*) In responding promptly to that assertion, the judge reiterated that jurors may take notes, but that they may not discuss them until deliberations begin. (*Id.*) Taken together, these instructions provided adequate guidance to prevent jurors from deliberating before the proper time, and do not provide sufficient grounds for either prong of a *Strickland* claim.

The only allegation Bell makes regarding actual predeliberation by jurors was contained in an affidavit by Bell's trial counsel, Mark Williams, which was submitted to the Supreme Court of Virginia with Bell's state habeas petition. In that affidavit Williams states that juror Larry J. Miles

reported after the completion of trial that jurors had predeliberated. (M. Williams Aff. ¶ 13, Pet'r's State App., Ex. 20.) Bell also alleges that there was some evidence in the record suggesting that jurors "may have been" comparing notes during the trial, though Bell presents no other allegation on this point. Even had the predeliberation actually taken place, Bell has not clearly articulated a federal constitutional right impaired by the alleged predeliberation. Because Bell cannot show ineffective assistance of counsel, I must find that his claim is procedurally defaulted in this court and deny relief.

3. SLEEPING JURORS.

Bell contends that he is entitled to relief as a result of the trial court's failure to investigate and act upon information that certain jurors were becoming sleepy and nodding off during trial. Bell also asserts that his counsel were ineffective in failing to challenge the offending jurors, request replacement jurors, and move for a mistrial.

The Supreme Court of Virginia heard Bell's substantive claim on habeas review and found that it was procedurally barred for not having been raised at trial or on direct appeal, pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). In Bell's case, the state court's application of *Slayton*'s procedural default rule provides an adequate and independent state law ground upon which to deny relief on federal habeas review, barring cause and actual prejudice or a miscarriage of justice. Bell is unable to meet his burden in showing cause and actual prejudice, and therefore I must deny relief.

The Supreme Court of Virginia reached the merits of Bell's ineffective assistance claim, finding

that Bell met neither the performance nor prejudice prong of *Strickland*. Because this portion of the claim was decided on the merits on state habeas review, it is entitled to a presumption of correctness under § 2254(e)(1) that may be rebutted only upon a showing of clear and convincing evidence. I find that Bell presents no such showing in this case. The relevant facts are as follows.

The record shows that at a bench conference on day two of the trial, the clerk indicated to the judge and parties: "The first lady. Both struggling to stay awake." (IV J.A. at 1737.) The clerk was apparently concerned that two jurors had had trouble staying awake during the preceding portion of the trial. The lawyers responded that the courtroom was hot, that it had been a long day, and that all jurors were becoming tired. (*Id.* at 1737–38.) The trial judge allowed the introduction of two more "short" witnesses; after the close of the final witness, the lawyers brought to the court's attention that two jurors had struggled to stay awake, and had been closing their eyes and nodding off. (*Id.* at 1751.) The trial judge noted that he had not seen the same because, at his angle, he was unable to see the jury at all times. (*Id.*) The judge noted that he would be on notice for the next day, recommended that the courtroom temperature be lowered, and adjourned for the day at 5:05 P.M. (*Id.* at 1751–52.)

On day three of the trial, at the close of witness Holben, the parties offered a joint motion to conclude for the day because "[t]he jury is exhausted. We are losing them One of them is having some trouble...." (V J.A. at 2044.) The prosecutor reported that "[o]ne lady slept through pretty much the last testimony." He also reported that he had been unable to watch

them, but that his staff had reported that "one lady almost fell off her chair." (V J.A. at 2045.) The clerk confirmed that it was the same juror who had trouble the day before. (*Id.*) In response, the judge indicated that he had been watching very closely, and granted the parties' motion to conclude for the day as the next witness would be "tedious." (*Id.*)

On day five of the trial, the prosecutor stated that the jury has "been struggling here this last hour again," and that he would "wake this jury up." (VI J.A. at 2430.) Defense counsel indicated that it was the same *male* juror that had had problems previously. (*Id.*) The court reported that it had "been watching," and stated, "I am not saying they don't get tired, but I haven't seen anybody nodding off." (*Id.* at 2431.)

Bell claims that, although his claim was found procedurally defaulted by the Supreme Court of Virginia, the fact that his counsel were ineffective in failing to object to the sleeping jurors, failing to ask for replacement jurors, and failing to move for a new trial demonstrates adequate cause for the default. Further, Bell asserts that because his claim is meritorious, he meets the actual prejudice standard. I disagree, and find that his counsel were not ineffective under *Strickland*, and that Bell is not entitled to relief from this court.

An ineffective assistance claim under *Strickland v. Washington* requires that Bell show that his counsel's performance was deficient, and that the deficiency prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. Bell is unable to meet his burden. In the cases cited by Bell, it was clear from the record that the trial court knew or acknowledged that a particular juror had slept through material

portions of the trial. *See Spunaugle v. State*, 946 P.2d 246, 253 (Okla.Crim.App.1997) (reversing trial court's denial of defendant's motion to replace juror with alternate where trial judge stated on the record that juror had "dozed during parts of the trial"); *People v. South*, 177 A.D.2d 607, 576 N.Y.S.2d 314, 314–15 (N.Y.App.Div.1991) (ordering new trial upon evidence that juror had slept through testimony and court's charge and upon trial court's acknowledgment that juror had closed her eyes during charge); *People v. Evans*, 710 P.2d 1167, 1168 (Colo.Ct.App.1985) (ordering new trial where trial court knew that juror was sleeping during defense's closing argument).

Here the evidence is far less compelling. The record indicates that at the end of long trial days, the entire jury became tired, and that particular members struggled to stay awake. However, the trial judge noted and paid close attention to jurors after the initial incident, and took steps to end for the day when it was evident the jurors were losing concentration. There is no evidence, from the parties or the court, of particular jurors having slept through portions of the trial, as in cases in which courts have granted relief on such claims. I find that counsel were not ineffective in performance, as they clearly notified the court when jurors became sleepy, and in response, the court reasonably and promptly responded to their suggestions regarding jurors.

Even if Bell's counsel had moved to replace jurors with alternates or for a new trial, I find it unlikely that the court would have granted such relief because the evidence was not sufficiently strong to warrant it. It is clear from my review of the record that Bell's counsel responded appropriately to the

facts before them, and that Bell was not prejudiced by their failure to act. Thus, Bell demonstrates neither the performance nor the prejudice prong under *Strickland*. Because Bell fails to demonstrate that his counsel were ineffective, I find that he fails to meet his cause and prejudice burden, and that his claim is procedurally defaulted as set out by the Supreme Court of Virginia. I therefore deny habeas relief on this claim.

4. DELIBERATIONS BY ALTERNATE JURORS.

Next, Bell alleges that he is entitled to habeas relief from this court because thirteen jurors deliberated in his case in violation of Article III, Section 2 of the United States Constitution and the Sixth Amendment, both of which guarantee a trial by jury to criminal defendants. Bell also asserts that his trial counsel were ineffective for failing to object to the fact that thirteen jurors deliberated.

Bell presented this claim for the first time in his petition for state habeas relief, and the Supreme Court of Virginia found it procedurally defaulted under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, 682 (1974), for having failed to raise the issue at trial or on direct appeal. *Bell II*, slip op. at 17–18. The court also held Bell's ineffective assistance of counsel claim unmeritorious on the facts and under the *Strickland* two-prong test. *Id.* at 18–19.

The record shows that after closing statements and prior to the formal charge to the jury, the court excused three alternate jurors who had been seated and had heard all of the evidence in Bell's case. (VII J.A. at 2764–65.) The alternates, Larry J. Miles, Charles D. Wood, Jr., and Michael D. Weir were excused and stepped out of the jury box, and the

remaining twelve jurors were given the charge and sent to the jury room to deliberate. (*Id.* at 2765–68.) Upon returning with and announcing a verdict, the defense moved for a poll of the jury. (*Id.* at 2770.) The record reflects that thirteen jurors were polled and responded that the verdict was theirs. (*Id.* at 2770–72.) Among those recorded as polled was Michael D. Weir, who had previously been excused as an alternate. (*Id.* at 2772.) Bell accordingly asserts that thirteen jurors were involved in the guilt phase deliberations. There is ample evidence, however, that the record erroneously recorded Mr. Weir's vote and that he did not in fact participate in deliberations.

In its response to Bell's state habeas petition before the Supreme Court of Virginia, the state filed an affidavit from the court reporter stating, "I included juror number 30, Michael Weir, in error, in the original transcript, Mr. Weir having been previously excluded before deliberations began." (Grimsley-Logan Aff. ¶ 5, Resp't's State App., Ex. 9.) Further, the polling at the sentencing phase records the verdicts of twelve jurors and does not include a vote from Mr. Weir. (VII J.A. at 2943–45.) Last, neither party objected nor raised the issue with the court at the time of trial. This evidence, together with the court reporter's affidavit, clearly indicates that the guilt phase poll was erroneously reported, and that twelve rather than thirteen jurors deliberated.

Moreover, the Constitution does not require a twelve-person jury in state criminal trials. *See Williams v. Florida*, 399 U.S. 78, 86, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). I find that Bell is unable to meet the cause-and-prejudice standard sufficient to

be afforded relief on his substantive claim. I also find that the Supreme Court of Virginia's decision regarding Bell's ineffective assistance of counsel claim must stand, as Bell has presented no clear and convincing evidence to rebut the presumption of correctness of the state court's decision under § 2254(e)(1). I find no evidence that the state court contravened or unreasonably applied federal law, or unreasonably determined the facts in this case under § 2254(d). Accordingly, I deny habeas relief.

5. PRETRIAL PUBLICITY AND PRESENCE OF UNIFORMED POLICE SPECTATORS.

Bell next asserts that his right to a fair trial was impeded both by extensive pretrial publicity, and by the presence of uniformed police officers in the gallery during the course of the trial. More specifically, Bell alleges that he is entitled to habeas relief from this court based on the totality of the circumstances of his trial or, alternatively, an evidentiary hearing on each of the claims. For the reasons explained below, I reject these claims.

Prior to and at trial, Bell filed several motions relating to publicity and uniforms in the courtroom. In a written pretrial motion, Bell moved to enjoin law enforcement officers from wearing uniforms in the courtroom while sitting as spectators, arguing that their presence would suggest to the jury that Bell is dangerous and that extra security is needed. Counsel also argued that the presence of uniformed officers would persuade the jury to base its verdict or sentence on considerations regarding the victim rather than the defendant's conduct. The court denied that motion.

Next, concerned about prejudice to the defendant, Bell orally moved the court to exclude from the courtroom insignias or tokens supportive of the state's position or memorializing Sergeant Timbrook. With the state's approval, the trial judge granted that motion. Next, counsel and the court took up the issue of venue and, in particular, whether to hold the trial in Winchester with a Staunton jury, or hold the trial in Staunton, assuming a Winchester jury could not be successfully impaneled. Bell's counsel appears to have moved to conduct jury selection in Staunton and the trial in Winchester. The court decided to withhold judgment on the matter, and the issue ultimately became moot when a Winchester jury was successfully impaneled.

Finally, Bell's counsel subpoenaed all written articles pertaining to the defendant in the murder of Sergeant Timbrook, which the newspapers in question moved to quash. The court granted the motion to quash, but allowed defense counsel to bill staff time for collecting the necessary information. The record contains no follow-up discussions regarding the collection of articles, nor evidence that such articles were presented to the court.

On direct appeal, Bell raised the issue regarding officers in the courtroom, but not the pretrial publicity issue. *See Bell I*, 563 S.E.2d at 713. Regarding spectators, the court found that Bell's motion to preclude uniformed officers had not been fully denied by the trial court. The trial court had allowed officers involved in the trial as bailiffs, witnesses, or security guards to wear uniforms, as well as on-duty police spectators, but had noted the potential for an "oppressive atmosphere" should too many uninvolved off-duty uniformed officers attend

the trial. The trial court noted that it would address that situation if it became necessary. However, neither the court sua sponte nor Bell's attorneys ever raised such objections; thus, the reviewing court found that there was no error in the trial court's ruling on the defense motion. *Id.*

On state habeas review, the Supreme Court of Virginia found Bell's change of venue claim procedurally defaulted because it was not raised on direct appeal. *Bell II*, slip op. at 26. Because the default was based on an adequate and independent state ground, I may grant relief on this claim only if Bell shows cause and actual prejudice, as outlined in previous sections of this opinion. As to the claim regarding uniformed officers, which was adjudicated on the merits in state court, § 2254(e)(1) requires that I presume the Supreme Court of Virginia's decision correct absent clear and convincing evidence to the contrary. I find that Bell is unable to prove otherwise.

Attendant to the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments is the principle that the accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, rather than "on grounds of official suspicion, indictment, continued custody" or other circumstances not proved at trial. *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). For example, inherent prejudice arises when a defendant is compelled to wear shackles in front of his jury. *See Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

Applying that principle in *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986),

the Supreme Court of the United States opined that not "every practice tending to single out the accused from everyone else in the courtroom" bears constitutional implications. In that case, the Court reviewed a claim brought by an incarcerated defendant alleging that his fair trial rights were impeded by the presence of four uniformed state troopers on the front row of the gallery during his trial. The Court acknowledged that, unlike shackles, the presence of identifiable security officers in the courtroom does not inherently prejudice a defendant, recognizing that there are a number of conclusions a jury may draw from the officers' presence. *Id.* at 569, 106 S.Ct. 1340. The Court held that the presence of uniformed officers was not enough to unmistakably brand the defendant with a mark of guilt. *Id.* at 571, 106 S.Ct. 1340. In reaching its decision, the Court adopted the following test for determining if the presence of uniformed officers during a criminal trial was unconstitutionally prejudicial: "whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.* at 570, 106 S.Ct. 1340 (quoting *Estelle v. Williams*, 425 U.S. 501, 505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). Such a claim is difficult to establish, and in making a determination on Bell's claim I must assess the scene presented to the jurors and determine whether what they observed was inherently prejudicial so as to pose an unacceptable threat to the defendant's right to a fair trial. *Id.* at 572,106 S.Ct. 1340.

In support of his *Holbrook* claim, Bell relies on *Woods v. Dugger*, 923 F.2d 1454 (11th Cir.1991). The habeas petitioner in Woods had been convicted of murdering a correctional officer. The crime had

occurred in a small, rural community in which the prison where the murder occurred provided employment for a significant proportion of the population. Just prior to the murder, the correctional officer had spoken publicly about understaffing at the prison, stating that he feared for his life. *Id.* at 1458. In addition to overwhelming media coverage of the case, the officer's family had circulated a petition signed by five thousand individuals calling for the death penalty for murders committed by incarcerated persons. *Id.* Most importantly in *Woods*, however, was the presence of forty-five uniformed prison guards during significant portions of the trial for no reason other than to observe the proceedings. The court held that in light of all the circumstances, the guards' presence at trial sent an unmistakable message that the defendant was guilty and deserved death as punishment. *Id.* at 1459–60. The court found that, as a result, the petitioner had been denied a fair trial. *Id.* at 1460.

In *Bell*'s case, conversely, the presence of uniformed officers during Bell's trial did not "brand" him with unmistakable guilt. *Holbrook*, 475 U.S. at 571, 106 S.Ct. 1340. Winchester is a small community and, accordingly, there was substantial publicity surrounding the trial. The record is clear that there were indeed uniformed officers in the courtroom as court employees, witnesses, and as spectators. However, there is no allegation that the officers were concentrated in a way that created an impression that Bell was dangerous, or that they were present in numbers similar to that in *Woods*. Further, the trial judge clearly acknowledged the potential for prejudice created by the presence of uniformed officers, and there is no evidence that any

such problem arose during the course of the trial. The trial judge also made well-reasoned decisions prohibiting potentially prejudicial apparel and insignias in the courtroom, and providing the defense with an opportunity to investigate local newspaper coverage of the trial.

In light of the evidence contained in the record, I find that the presence of the officers in the courtroom, even when coupled with the pretrial publicity, did not pose an unacceptable threat to Bell's right to a fair trial, nor was there an unacceptable risk of impermissible factors having come into play. Accordingly, the state court's decision regarding officers in the courtroom is neither contrary to nor an unreasonable application of clearly established federal law under *Holbrook* or the United States Constitution. I therefore deny habeas relief.

Similarly, I find that an evidentiary hearing on the matter is unwarranted, as the existing record clearly articulates the basis for the trial court's and reviewing court's reasonable decisions on these issues. Under § 2254(e)(2), I may not hold an evidentiary hearing unless a petitioner demonstrates facts not previously discoverable through due diligence, and that clear and convincing evidence provides that he would not have been found guilty of the underlying offense. For the reasons already stated, Bell fails to meet his burden. Thus, I must deny his request for an evidentiary hearing.

As to Bell's change of venue claim, I find for similar reasons that he has not sufficiently shown cause and prejudice to overcome the state procedural default.

G. Claim VII—Violation of Bell's Right to be Present at Trial.

Bell next alleges that his rights under the Confrontation and Due Process Clauses were violated when he was excluded from critical stages of his own trial, and when a trial witness was permitted to give prejudicial, unsworn testimony.

1. Critical Stages of Trial.

Bell asserts that his confrontation and due process rights were violated on numerous occasions during which conferences and jury and witness interactions were held outside his presence. In particular, Bell asserts that he was absent for conferences regarding (1) DNA and fiber analysis tests, (2) whether to admit Bell's prior conviction, (3) whether to play 911 tapes for the jury, (4) whether and how to shackle Bell at trial, and (5) Bell's own statement. Bell also cites absences during conferences regarding prosecution witness Terry Lee Johnson. Specifically, Bell cites a hearing during which Bell's attorney communicated a conflict of interest for having previously represented Johnson, and an additional hearing regarding the failure to administer an oath to Johnson prior to his testimony. Bell last alleges absences from a hearing determining the court's response to a juror question regarding Bell's potential release from a life imprisonment sentence, and from the jury's viewing of the crime scene.

On state habeas review, the Supreme Court of Virginia found this claim procedurally defaulted for not having been raised on direct appeal. *Bell II*, slip op. at 19. The court held unmeritorious Bell's ineffective assistance of counsel claim, reasoning

that Bell was not harmed by his counsel's failure to object to his absences because no evidence indicated that Bell had not been informed of the discussions from which he was absent, or that he had objected to his absence. *Id.* at 19–20. The court also noted that the substance of some conferences was summarized on the record. *Id.* at 19.

Bell concedes that his substantive claim was procedurally defaulted on state habeas review, but alleges that he is able to show cause and actual prejudice sufficient to overcome the finding of default. Bell alleges he meets the cause prong because his counsel were ineffective for failing to object to his absence from portions of his trial. He alleges prejudice because his claim is "meritorious." I find that Bell fails to meet the cause-and-prejudice standard as required to overcome a finding of procedural default under the AEDPA and *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). For the foregoing reasons, I deny relief.

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The right extends to defendants in both federal and state proceedings. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by the Confrontation Clause is a defendant's right to cross-examination, *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), which is critical to ensuring the integrity of the fact-finding process. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant's right to be

present extends not only to trial proceedings, but to all critical stages of the proceedings. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). When determining whether a constitutional violation occurred, I must also consider whether the defendant's exclusion from the hearing interfered with his ability to cross-examine effectively. *Id.* at 740, 107 S.Ct. 2658.

Bell asserts that his counsel were sufficiently ineffective to meet the "cause" prong required by *Coleman*. The Supreme Court of Virginia on habeas review, however, determined that Bell's counsel were not ineffective under either the performance or the prejudice prong of *Strickland*. Under § 2254, I may only grant relief on this claim if Bell shows that the state court unreasonably applied or acted contrary to existing federal law. Bell fails to do so.

Here, after reviewing all of the alleged errors, I find that the proceedings from which Bell alleges his erroneous absence neither were critical stages of the trial nor interfered with his ability to cross-examine. I find also that Bell's absence from any of the proceedings did not inhibit his opportunity to defend against the charge. *See Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 17, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). No instance cited by Bell involved an out of court examination of a witness, nor a situation in which a witness could not be cross-examined again in open court in front of the jury. Most instances were related to evidence to be admitted at trial. Some evidence, like the testimony of an additional DNA expert, was favorable to Bell's position and was allowed by the judge. In the case of evidence not

favorable to Bell, Bell was presented with the opportunity, in open court, to object to the admission of such testimony and to cross examine any opposing witnesses. Other conferences related to insignificant aspects of trial, like alerting the trial court to the upcoming introduction of evidence and resolving a question regarding the proper numbering of an exhibit. (V J.A. at 2051–52.)

I also find that fairness was not frustrated by his absence, and, in fact, was guarded closely by the trial court. Generally, it was clear that in the proceedings cited by Bell, the judge and the parties were sensitive to Bell's absence, and the judge prefaced discussions by setting parameters regarding the scope of what could fairly be covered outside Bell's presence. (III J.A. at 866–67.) On at least one occasion the judge halted the proceeding so that the defendant could be brought in before continuing. (IV J.A. at 1616.) On another occasion, the judge offered to summarize a conference on the record, but Bell's counsel volunteered to brief Bell during a break. (V J.A. at 2053.) Fairness to Bell was clearly protected by the actions of the judge and the parties.

Because there is no evidence that Bell's confrontation rights were compromised by his intermittent absence from pretrial and trial proceedings, I find that Bell is unable to meet either the performance or prejudice standard required for an ineffective assistance claim under *Strickland*. Thus, he is unable to overcome the procedural default found by the Supreme Court of Virginia, and I must accordingly deny relief.

In addition to his Confrontation Clause claim, Bell asserts a concurrent claim that his absence from

certain trial proceedings violated his due process rights. The Court has also held that a defendant has a right under the Due Process Clause of the Fourteenth Amendment to "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder*, 291 U.S. at 105–06, 54 S.Ct. 330. Due process requires that a defendant be present "to the extent that a fair and just hearing would be thwarted by his absence." *Id.* at 108, 54 S.Ct. 330. Stated differently, a defendant is entitled to be present at any stage of the criminal proceeding against him that is critical to its outcome if his presence would contribute to the fairness of the proceeding. *Stincer*, 482 U.S. at 745, 107 S.Ct. 2658. For the reasons stated above, I find that there is no cognizable due process claim here sufficient to overcome the Supreme Court of Virginia's finding of procedural default on Bell's substantive and ineffective assistance of counsel claims. I therefore deny relief.

2. UNSWORN TESTIMONY.

Bell next argues that his confrontation rights were violated when Terry Lee Johnson, a prosecution witness, gave testimony at trial without having first been sworn.

Witness Terry Lee Johnson was brought to the courtroom during the end of a conference on a number of small matters. In the haste to resume the trial, the court failed to administer an oath to him before he began his testimony. After Johnson's testimony, the prosecution rested. (VI J.A. at 2546.) The following morning, it appears that the parties had an off-the-record conference regarding the

failure to swear in Johnson, the outcome of which was reflected in the trial court's summary the next day. (IV J.A. at 2558.) Outside the presence of the jury, Johnson was returned to the stand and swore that the testimony he had given the previous day was truthful. (*Id.* at 2559.) The jury was apprised of Johnson's recall and retroactive oath upon returning to the jury box, but did not witness it. (*Id.* at 2569.)

Johnson's testimony proved damning to Bell. On direct examination, Johnson testified that he was housed near Bell in jail and grew to know him fairly well. He stated that Bell had told him about killing Sergeant Timbrook and that he had been offered no deal or incentive in exchange for his testimony. Bell asserts that Johnson's testimony was false, citing an affidavit in which Johnson repeatedly told police that he knew nothing about the case, that police had provided reports from which Johnson had allegedly created his testimony, and that he was offered a two and a half year sentence reduction, a transfer to a favorable work unit, and visits from family and his girlfriend. Bell claims that his Sixth Amendment rights were violated by the court's failure to have initially administered an oath to Johnson and that he is entitled to relief.

On state habeas review, the Supreme Court of Virginia found this claim procedurally defaulted for not having been raised at trial or on direct appeal. *Bell II*, slip op. at 16–17.[25] *Id.* Under *Murray v.*

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[25] Bell argues that he presented a related ineffective assistance of counsel claim to the Supreme Court of Virginia on two occasions. First, Bell raised the issue in his petition for rehearing, which was denied by the court. Under *Ylst v. Nunnemaker*, 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d

Carrier, 477 U.S. 478, 489, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), I may not review a claim of ineffective assistance of counsel that was not raised in the state courts. Because Bell provides no evidence of cause and prejudice or a fundamental miscarriage of justice as required by *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), I find that his claim is procedurally defaulted here, and I must deny relief.

H. CLAIM VIII—DEPRIVATION OF THE PRESUMPTION OF INNOCENCE.

Bell next contends that his appearance in shackles in view of potential jurors during voir dire impermissibly violated his due process rights and tainted the presumption of innocence to which he was entitled. Bell argues that he is entitled to habeas relief or, at a minimum, an evidentiary hearing on this issue.

On state habeas review, the Supreme Court of Virginia found that this claim was procedurally defaulted because it was not raised at trial or on direct appeal. *Bell II*, slip op. at 20. Bell also asserted at the state habeas level that his counsel were ineffective in failing to object on the record to the use of shackles and the related in-chambers

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706 (1991). I find that the court did not "fairly appear" to rest on federal law when denying the petition for rehearing. A presumption of procedural default is therefore warranted. *Id.*

Bell allegedly raised this claim for a second time in his corrected petition for state habeas relief. While Bell does assert a blanket ineffective assistance claim in that petition, he fails to allege the substantive claim with which the ineffective assistance claim would have corresponded. Thus, it is clear that this ineffective assistance of counsel claim was never properly raised with the Supreme Court of Virginia.

conference, and in failing to raise this issue on direct appeal. *Id.* at 20. The court held that Bell's claim for ineffective assistance was unmeritorious in failing to meet either prong of the *Strickland* test. *Id.* at 20–21. The relevant facts are as follows.

The trial record indicates that for a portion of voir dire on the first day of trial, Bell wore leg shackles comprised of restraints around both ankles joined by a chain. (III J.A. at 1153.) Bell alleges that during an off-the-record chambers conference, his counsel objected to the shackles. As a result, it was agreed to remove the shackles in favor of leg weights that Bell wore under his pant legs and that were not visible to the jury. In noting the change on the record, the trial judge stated that while wearing the shackles, Bell "was positioned in the courtroom ... so that the jury could not see." (III J.A. at 1153.) Bell alleges that the short time during which he wore shackles impermissibly prejudiced the jury against him and violated the presumption of innocence to which he was entitled.

In support of his claim, Bell cites the affidavit of juror Connie P. Greer, first presented in his state habeas petition, who made a statement regarding a perceived lack of mitigation evidence presented on Bell's behalf during the penalty phase of trial. She stated that in viewing the defendant, "what I saw, including his shackles, was a mean looking person." (Greer Aff. ¶ 2, Pet'r's State App., Ex. 7.) Bell also cites the affidavit of his trial counsel, Jud Fischel, who stated that "[t]here was ... no question that the jury could see the shackles." (Fischel Aff. ¶ 12, Pet'r's State App., Ex. 19.) Bell asserts that these statements prove the jury's awareness of his

restraints and that they had an "undeniable effect" on jurors' perception of him.

The Supreme Court has held that three considerations militate against the use of shackles during a criminal trial: (1) the presumption that the defendant is innocent until proved guilty; (2) the right to counsel and to secure a meaningful defense; and (3) a dignified courtroom process. *See Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Coffin v. United States*, 156 U.S. 432, 458–59, 15 S.Ct. 394, 39 L.Ed. 481 (1895); *see also Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005).[26] The right to a presumption of innocence is relative to other rights, namely the safety of jurors, courtroom personnel, and trial spectators. *See United States v. Samuel*, 431 F.2d 610, 615 (4th Cir.1970). Thus, the right to freedom of movement in the courtroom is not an absolute, unqualified right, although if the trial judge exercises the discretion to implement safety measures, she must articulate reasons for such actions on the record and outside the presence of the jury. *Id.*; *Brewster v. Bordenkircher*, 745 F.2d 913, 916 (4th Cir.1984) (applying rule to state criminal proceedings).

Here, because Bell's substantive claim regarding his being shackled in view of the jury venire was found procedurally defaulted by the Supreme Court

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[26] The holding in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), on which Bell relies strictly, extends the shackling prohibition to the penalty phase of trial. *Deck*'s holding is not relevant because Bell was not shackled in view of the jury during his trial's penalty phase.

of Virginia, I may afford Bell relief only if he shows cause and prejudice sufficient to overcome the default. Bell asserts that his counsel's ineffectiveness at trial provides adequate cause. However, I may adopt Bell's reasoning only if I find that the Supreme Court of Virginia, in ruling on the merits of Bell's ineffective assistance claim, acted contrary to or unreasonably applied clearly established federal law, or unreasonably determined the facts in light of the evidence presented to that court. 28 U.S.C.A § 2254(d). I find that Bell fails to meet his burden.

As explained previously, *Strickland* sets out a two-pronged test for proving ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, counsel are ineffective only when counsel's performance at trial was deficient, and the deficiency would have resulted in a different trial outcome. *Id.* Bell fails to meet his burden on either prong. As to the performance prong, it is true that Bell was shackled in the courtroom during a portion of voir dire, and that the trial judge failed to articulate any reason on the record for shackling Bell. The record is clear, however, that Bell's counsel objected to the shackling, though in an off-the-record conference, and that the trial court satisfactorily remedied the situation. While the remedy did not follow the letter of the procedure required by the law of this circuit, it does not appear from the record that counsel's performance was objectively unreasonable as required by *Strickland*.

Bell is also unable to prove prejudice. While Bell alleges that one juror recalled Bell's having been shackled, juror Greer does not allege that her vote to

convict would have been different had Bell not been shackled. In fact, Greer's testimony related primarily to the mitigation evidence that was presented on Bell's behalf, rather than on any conclusion she drew regarding his guilt or innocence. Further, there is no allegation that any juror other than Greer actually saw the shackles. The trial judge noted on the record that Bell was positioned in the courtroom so that the jurors were unable to see his shackles, and that they were removed in favor of leg weights prior to the close of voir dire. While this does contradict the affidavit of Bell's trial counsel, under § 2254(e)(1) I must presume that the trial court's finding was correct. In total, there are no allegations made by Bell to suggest that the outcome of his trial would have, in any way, been altered by his counsel's having objected earlier to his shackling. Bell fails to make out an ineffective assistance claim, and thus fails to overcome the Supreme Court of Virginia's finding of procedural default here.

Bell asserts that, at the least, he is entitled to an evidentiary hearing on the shackling issue. As has been summarized previously, because Bell failed to develop the factual basis of his claim during state court proceedings, I may not hold an evidentiary hearing on Bell's claim unless there is clear and convincing evidence that but for the constitutional error, Bell would have been found not guilty. 28 U.S.C.A § 2254(e). After reviewing the facts regarding this claim, I find that Bell fails to meet his burden under § 2254(e), and that I must also deny his request for an evidentiary hearing.[27]

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[27] The case upon which Bell relies to make his claim for an evidentiary hearing, *Woodards v. Cardwell*, 430 F.2d 978, 981

I. CLAIM IX—VIOLATION OF THE VIENNA CONVENTION ON CONSULATE RELATIONS.

In his ninth claim for relief, Bell contends that the state violated his rights under the Vienna Convention on Consular Relations which, upon the arrest of a foreign national, requires notification of the diplomatic representatives of the nation of which the individual taken into custody is a citizen. Vienna Convention on Consular Relations ("Vienna Convention") art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262, *available* at 1969 WL 97928. The Vienna Convention is a seventy nine article, multilateral treaty governing the establishment of consular relations between nations and defining the functions of a consulate. *United States v. Emuegbunam*, 268 F.3d 377, 388 (6th Cir.2001). Article 36 is entitled "Communication and contact with nationals of the sending State"[28] and provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with

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(6th Cir. 1970), was decided before the AEDPA was revised in 1996 to further narrow the class of situations in which I may grant such a hearing.

[28] The sending state is the nation of the arrested foreign national, and the receiving state is the arresting nation. *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620 n. 1 (7th Cir.2000).

and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention, 1969 WL 97928.

Bell claims that Article 36 bestows a judicially enforceable individual right upon detained foreign nationals to consult with the consular officials of their country, and that his right was violated when the Winchester police failed to notify him of his right to communicate with the Jamaican consulate at the time he was arrested.

Before his trial, Bell filed a motion to suppress evidence and to dismiss the indictment because of this alleged violation. The trial court denied the motion, and, on direct appeal, Bell asserted that the trial court erred by refusing to suppress his statement to the police.[29] *Bell I*, 563 S.E.2d at 705. The Supreme Court of Virginia rejected Bell's claim on direct appeal, finding that (1) the Winchester Police Department did not violate any rights that Bell had under Article 36 of the Vienna Convention, (2) even if there were a violation, the Vienna Convention does not create legally enforceable individual rights that a defendant may assert in a criminal proceeding to reverse a conviction, and (3) even if there were a legally enforceable individual right, suppression of evidence would not be an available remedy. *Bell I*, 563 S.E.2d at 705–07. On state habeas review, the Supreme Court of Virginia held that Bell's Vienna Convention claim was barred because the issue was raised and decided both in the trial court and on direct appeal. *Bell II*, slip op. at 27.

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[29] Bell did not assert on appeal that the trial court erred in refusing to dismiss the indictment. *Bell I*, 563 S.E.2d at 705.

The state habeas court cited *Henry v. Warden*, 265 Va. 246, 576 S.E.2d 495, 496 (2003), for the proposition that claims decided at the trial court and on direct appeal are barred from state habeas review. As explained above, however, a dismissal under *Henry* does not bar federal habeas review of claims that already may be properly considered by this court through their presentation on direct appeal. *See Goins v. Angelone*, 226 F.3d 312, 320 n. 3 (4th Cir.2000) (recognizing that the rule in the precursor to *Henry* does not prevent federal habeas review of otherwise properly raised claims). Because this claim was adjudicated on the merits in state court, however, I must apply the deferential review set out in § 2254(d), and grant relief only if the state court decision contravened or unreasonably applied clearly established federal law. I find that the state court's decision denying this claim on direct appeal was reasonable and therefore must deny relief.

Evidence of record relevant to this claim for relief shows that shortly after his arrival at the police station, Bell told an investigative sergeant that he was born in Jamaica and had been in the United States for seven years. Thereafter, Bell was read his Miranda rights and answered questions for approximately thirty minutes. After the questioning ceased, the sergeant advised Bell that the Jamaican consulate would be advised of his arrest. Bell immediately stated that he did not want his consulate to be notified, but the sergeant explained that it was a mandatory process. Because of an oversight, it was not until thirty-six hours later that David Sobonya, a captain with the Winchester Police Department, faxed a notification of Bell's arrest to the Jamaican consulate in Washington, D.C. It does

not appear from the record that the Jamaican consulate ever responded to this notification.

1. ALLEGED VIOLATION.

In its decision on direct appeal, the Supreme Court of Virginia first found that any rights that Bell has under Article 36 of the Vienna Convention were not violated. In reaching this conclusion, the state court first noted that the police told Bell the Jamaican consulate would be notified of his arrest, and also that actual notification was sent approximately thirty-six hours after Bell was taken into custody. *Bell I*, 563 S.E.2d at 705–06. The court explained that Article 36 requires only that notification be made "without delay" rather than immediately upon arrest or prior to interrogation, and concluded that the thirty-six hour time frame in Bell's case satisfied that requirement. *Id.* at 706. The court further held that because Bell objected to any notification being sent to his consulate, there was no violation of Article 36 resulting from the fact that the police did not expressly advise Bell of any rights he may have under the Vienna Convention. *Id.*

I find reasonable the state court's determination that the thirty-six hour time lapse in this case met the "without delay" requirement of Article 36. However, I am troubled by the state court's conclusion that simply because Bell objected to any notification being sent to his consulate, there was no violation of Article 36 arising from the Winchester Police Department's failure to expressly advise Bell of his right to communicate with the Jamaican consulate. As petitioner points out in his brief, informing Bell that the police were required to

contact the Jamaican consulate does not necessarily convey to Bell that he himself had a right under Article 36 to seek assistance from his consulate. Thus, while the Winchester Police Department discharged its duty to inform the Jamaican consulate without delay of Bell's arrest, they arguably failed to "inform the person concerned without delay of his rights under [the treaty]." Vienna Convention, 1969 WL 97928. Nonetheless, I am not required to pass judgment on the reasonableness of the state court's decision on this issue, because I find that its determination that Bell lacks standing to assert a violation of the Vienna Convention was reasonable under § 2254(d).

2. STANDING.

The threshold question that must be addressed in order to determine whether Bell can obtain relief on his Vienna Convention claim is whether an individual foreign national has standing to assert a violation of Article 36. The Supreme Court of Virginia found that a foreign national has no such standing, and I find that this determination is reasonable under § 2254(d). Thus, I must deny relief on this claim.

As a general rule, international treaties do not create personal rights that an individual may enforce in the courts of its signatories. *See Emuegbunam*, 268 F.3d at 389. Indeed, there is a presumption that the rights created by an international treaty belong to a state and that private individuals cannot enforce them. *Id.* This presumption can be overcome by express language in the treaty providing for particular judicial remedies or when the treaty creates fundamental rights on

par with those protected by the Constitution. *Id.* at 390. Nonetheless, an individual enforcement right will not be inferred simply because a treaty provides for certain behavior by signatory states that happens to benefit individuals. *See State v. Sanchez-Llamas*, 338 Or. 267, 108 P.3d 573, 577 (2005) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), and *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975)).

Despite the presumption that a treaty does not confer individual rights, Bell argues that Article 36 confers rights to consular access that are enforceable by detained individuals in a judicial proceeding. Admittedly, Article 36 expressly refers to the detainee's "rights" to consular access and notification, but that alone does not demonstrate an intent to create private enforcement rights. This is especially true in light of the fact that "the treaty does not specify the nature of the declared 'rights' or any remedy that is required for their breach." *Sanchez-Llamas*, 108 P.3d at 577. Furthermore, the treaty's preamble focuses on the relationships between nations and expressly disclaims the creation of individual enforcement rights:

> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, realizing that the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States....

Vienna Convention, 1969 WL 97928 (emphasis added); *see Emuegbunam*, 268 F.3d at 392 (explaining that the Vienna Convention's preamble expressly disclaims the creation of individual rights); *State v. Navarro*, 260 Wis.2d 861, 659 N.W.2d 487, 491 (2003) (explaining that the preamble unambiguously renounces the creation of individual rights); *but see Sanchez-Llamas*, 108 P.3d at 577 & n. 7 (stating that the preamble does not contain a *clear* denial of an intent to create individual rights, but noting that the purposes stated in the preamble and in the initial clause of Article 36 suggest a concern with relationships and obligations among nations rather than individuals).

In addition to the general presumption that international treaties do not confer individual rights and the absence of any indication in the Vienna Convention of an intent to depart from this presumption, the State Department's consistent position on the issue supports the Supreme Court of Virginia's ruling that Article 36 does not confer individually enforceable rights. "[S]ince at least 1970, the State Department has maintained that the [Vienna Convention] does not create enforceable individual rights and that 'the only remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist *between [signatory] states* under international law." *Sanchez-Llamas*, 108 P.3d at 577–78 (quoting *United States v. Li*, 206 F.3d 56, 63–64 (1st Cir.2000) (emphasis supplied)). Given that the State Department is responsible for negotiating and administering treaties, this interpretation is entitled to great weight. *Sanchez-Llamas*, 108 P.3d at 578 (citing Li, 206 F.3d at 67 (Selya and Boudin, JJ.,

concurring)). Nonetheless, before passing on the reasonableness of the state court's decision, consideration must be given to international case law interpreting the treaty.

The International Court of Justice ("ICJ") has issued two opinions that address the United States' obligations under the Vienna Convention, *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466 (June 27), and *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (March 31).[30] In *LaGrand*, Germany claimed that the United States had violated the consular rights of the German government and two German nationals who were not informed of their consular rights until several years after they had been arrested for murder in Arizona. *LaGrand*, 2001 I.C.J. at 471, 475. The ICJ found that "Article 36, paragraph 1, creates individual rights, which ... may be invoked in [the ICJ] by the national State of the detained person." *Id.* at 494. As the Supreme Court of Virginia noted on direct appeal, the ICJ in *LaGrand* did not go so far as to hold that Article 36 of the Vienna Convention creates individually enforceable legal rights that a detainee may assert in a domestic criminal proceeding to reverse a conviction. *Bell I*, 563 S.E.2d at 706; *see also Navarro*, 659 N.W.2d at 493 (reaching the same conclusion). However, a few years later in *Avena*, the ICJ explained that "what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given

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[30] Bell relies only on *LaGrand* in his petition, but both cases concern a foreign detainee's standing to assert Vienna Convention violations.

to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Avena*, 2004 I.C.J. at 65. Thus, *Avena* did hold that the United States has an obligation to permit detainees to raise Article 36 claims in our domestic courts. *See Jogi v. Voges*, 425 F.3d 367, 383 (7th Cir.2005).

While Avena and, to a lesser degree, *LaGrand* support Bell's contention that Article 36 of the Vienna Convention creates individually enforceable rights of consular notification, these ICJ decisions do not constitute binding precedent on domestic cases involving different parties. The statute of the ICJ states that its decisions have "no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, Article 59. "Just as I.C.J. decisions are not considered binding precedent by the I.C.J., nor are they considered authoritative statements of international law in domestic courts." *United States v. Hail*, No. CR 03 910(CPS), 2005 WL 1984463, *10–11, 2005 U.S. Dist. LEXIS 24879, *33 (E.D.N.Y. Aug. 17, 2005). Furthermore, the United States is no longer a party to the Optional Protocol to the Vienna Convention, which provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ]." Vienna Convention, Optional Protocol art. I, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262, *available* at 1969 WL 97928 ("Optional Protocol"). While the United States was a party to the Optional Protocol until recently, on March 7, 2005, President Bush, through the Secretary of State, notified the United Nations that the United States had formally withdrawn from the

jurisdiction of the ICJ in disputes over Vienna Convention claims. *See Medellin v. Dretke*, 544 U.S. 660, —, 125 S.Ct. 2088, 2101, 161 L.Ed.2d 982 (2005) (O'Connor, J., dissenting) (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary General of the United Nations (Mar. 7, 2005)).

The Supreme Court has not yet addressed the issue directly, but Bell argues that *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998), stands for the proposition that individuals have enforceable rights under the Vienna Convention. However, although the *Breard* Court noted that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," the Court ultimately found that the defendant's claim was barred on procedural grounds and thus declined to decide the issue of standing. *Breard*, 523 U.S. at 376, 118 S.Ct. 1352. Furthermore, the *Breard* Court noted that "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions." *Id.* at 377, 118 S.Ct. 1352. Given that the Court expressed doubt as to a signatory nation's right of action in United States courts, it is unlikely it would hold that an individual foreign detainee could pursue such an action. *See Emuegbunam*, 268 F.3d at 394; *Navarro*, 659 N.W.2d at 493; *State v. Martinez-Rodriguez*, 131 N.M. 47, 33 P.3d 267, 274 (2001).

In light of the *LaGrand* and *Avena* cases, the Supreme Court's vague comments on whether Article 36 is individually enforceable, the State

Department's position on the issue, and the general presumption that international treaties do not confer individual rights, "[i]t remains an open question whether the Vienna Convention gives rise to any individually enforceable rights." *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir.2001). Indeed, one circuit has held that the Vienna Convention confers individual rights, other circuits have held that it does not, and still others have stated that it remains unclear. *See United States v. Villa-Ortega*, 2005 WL 3018687, at *3, 2005 U.S. Dist. LEXIS 28234, at *11 (D.Kan.2005) (citing a Seventh Circuit case holding it does confer individual rights; First, Second, Fifth, and Sixth Circuit cases holding that it does not confer individual rights; and Third, Ninth, and Tenth Circuit cases stating that it is unclear). Because no clearly established federal law directs that Article 36 creates an individually enforceable right to consular access, it cannot be said that the Supreme Court of Virginia's determination that it does not confer such a right is contrary to, or involves an unreasonable application of, clearly established federal law.[31] *See*

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[31] The Supreme Court has recently granted certiorari in two cases that raise issues under the Vienna Convention. *See Sanchez-Llamas v. Oregon*, — U.S. —, 126 S.Ct. 823, 163 L.Ed.2d 704 (2005); *Bustillo v. Johnson*, — U.S. —, 126 S.Ct. 823, 163 L.Ed.2d 704 (2005). Thus, the effect that the Avena case will have in our domestic courts and accordingly the question of whether Article 36 confers individually enforceable rights may be resolved. This does not change the fact that, at the time the Supreme Court of Virginia decided Bell's Vienna Convention claim, there was no clearly established federal law on the issue.

28 U.S.C.A. § 2254(d). Thus, I must deny relief on this claim.

3. PREJUDICE.

Furthermore, even if Bell had individually enforceable rights under the Vienna Convention, he failed to show that he was prejudiced as a result and thus cannot prevail. *See Murphy v. Netherland*, 116 F.3d 97, 100–01 (4th Cir.1997). Bell asserts in his petition that, had he been advised of his right under the Vienna Convention, he would have contacted a Jamaican consular officer who would have counseled him not to make statements to the police outside the presence of counsel. However, Bell was informed of his right to remain silent by the officers who interrogated him and yet he chose to make statements. Also relevant to the prejudice inquiry is the fact that the circumstantial evidence against Bell was substantial. Thus, Bell cannot show he was prejudiced by any alleged violation of the Vienna Convention.

4. REMEDY.

Moreover, suppression of Bell's statements would not have been a proper remedy even if Bell had standing and could show prejudice. Application of the exclusionary rule is only appropriate when the Constitution or a statute requires it, and there is no exclusionary rule generally applicable to violations of international law. *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir.2000). The Supreme Court has held that treaties are on equal footing with statutes, and thus the rights protected by the Vienna Convention are equivalent to those protected by a statute. *Id.* Accordingly, "the exclusionary rule is an appropriate sanction for a

violation of a treaty provision only when the treaty provides for that remedy." *Id.* There is nothing in the text of the Vienna Convention indicating that suppression of evidence is the appropriate remedy for violations of Article 36. *Id.* (citing *United States v. Ademaj*, 170 F.3d 58, 67 (1st Cir.1999) (holding that "the Vienna Convention itself prescribes no judicial remedy or other recourse for its violation"); *see also United States v. Li*, 206 F.3d 56, 60 (1st Cir.2000) (*en banc*) ("We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment.")). Indeed, "American courts have held with near unanimity that suppression is not an appropriate remedy for a violation of the Vienna Convention, assuming it creates an individual right." *See Hall*, 2005 WL 1984463, at *12, 2005 U.S. Dist. LEXIS 24879, at *36–37 (listing cases). Thus, the Supreme Court of Virginia's resolution of Bell's Vienna Convention claim was undoubtedly reasonable under § 2254(d).

J. CLAIM X—DEFECTS IN VIRGINIA'S DNA TESTING PROCEDURES.

Bell next contends that defects in Virginia's DNA testing procedures entitle him to habeas relief. At trial, the state presented the testimony of forensic expert Karen Ambrozy, who explained that forensic testing of the DNA recovered by swabbing the grips, butt, trigger, and trigger guard of the gun used to shoot Timbrook could not eliminate Bell as a co-contributor of the DNA, which was consistent with a mixture of DNA from at least three individuals. *Bell I*, 563 S.E.2d at 702. Bell notes that the obvious implication of such evidence is that Bell did indeed

handle the weapon, and that the jury likely weighed this evidence heavily for the simple reason that DNA evidence is often perceived to be infallible. Bell argues that this DNA evidence that could neither include or exclude Bell as a co-contributor of the DNA conflicts with the DNA evidence one would expect to find if the weapon were truly Bell's. To support this contention he notes (1) that both Billie Joe Swartz and Aretta Terry testified that Bell regularly engaged in target practice and that the police found a wide range of bullets in Bell's home, and (2) that Ambrozy testified that a frequently used object is likely to be testable for one person's DNA. Based on this reasoning, Bell claims that the DNA evidence presented by the state was low-level and potentially inaccurate, that his counsel were deficient to the extent that they failed to raise this claim at trial or on direct appeal, and that, if the DNA evidence in his case has been destroyed, his Fourteenth Amendment due process rights have been violated.

Bell did not present these speculative claims at trial, on direct appeal, or in his state habeas petition, and thus they are foreclosed from federal habeas review. As explained above, under § 2254(e)(2), a petitioner cannot present a new claim for the first time on federal habeas review unless (1) he was diligent in developing his claim in state court or (2) he was not diligent but his claim relies on either a new rule of constitutional law made retroactive by the Supreme Court or new facts that could not have been previously discovered through the exercise of due diligence *and* the facts would be sufficient to establish, by clear and convincing evidence, that but for the constitutional error, no reasonable fact-finder

would have found the petitioner guilty of the underlying offense. *Williams v. Taylor*, 529 U.S. 420, 435–36, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The only argument Bell makes to support his contention that the DNA evidence presented by the state was potentially erroneous is the testimony of two witnesses who stated that Bell often engaged in target practice, the fact that police found a wide range of bullets at Bell's home, and the testimony of Ambrozy who stated that a frequently used object is likely to be testable for one person's DNA. All of this evidence was available to trial and appellate counsel, and thus it cannot be said that Bell was diligent in pursuing this claim. With respect to the ineffective assistance argument, the failure of trial and appellate counsel to raise these DNA claims was readily apparent to Bell's state habeas counsel, and thus Bell cannot be said to have been diligent on this claim either. Because Bell cannot make the more stringent showing necessary to present a new claim when diligence is lacking, the DNA claims are barred by § 2254(e).

Despite the fact that Bell never presented any of these claims to the state court, he argues that they are not foreclosed from review because of Virginia's newly created writ of actual innocence. The relevant Virginia statute provides that, "[n]otwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence...." Va.Code Ann. § 19.2 327.10 (Michie 2004). While human biological evidence may not be used as the sole basis for relief under this writ, it may be used in conjunction with other evidence.

Va.Code Ann. § 19.2-327.11 (Michie 2004). However, in petitioning the Court of Appeals for such a writ, a petitioner must allege, among other things, that the evidence supporting the allegation of innocence was "unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final" and "that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction." *Id.* As explained above, all of Bell's evidence supporting his claim that the DNA evidence against him was potentially erroneous was available at the time of his trial. Despite the fact that this evidence was known all along, Bell does not allege that he has ever requested further DNA testing until now. Therefore, he cannot meet the standard for Virginia's writ of actual innocence. Moreover, even if Bell could successfully petition for a writ of actual innocence, it is clear that the Virginia legislature did not intend that a pending or potential petition for writ of actual innocence should delay or stay post-conviction proceedings in this court. *See id.* ("Nothing in this chapter shall constitute grounds ...to delay or stay any other post-conviction appeals or petitions to any court."). Accordingly, Virginia's writ of actual innocence process does not cure Bell's failure to assert this claim in state court, and it is thus foreclosed from review in federal court.

K. CLAIM XI—UNCONSTITUTIONALITY OF VIRGINIA'S ADMINISTRATION OF THE DEATH PENALTY.

In his eleventh claim for relief, Bell attacks the constitutionality of Virginia's administration of the

death penalty at the trial level, on appeal, and at the post conviction review stage. First, with respect to the trial and direct appeal stages, Bell complains that the death penalty scheme in Virginia is unconstitutional under the Eighth and Fourteenth Amendments due to geographic disparity in the prosecution of capital offenses, the role that race plays in the imposition of the death penalty, the disproportionate number of lower-income defendants sentenced to death, and low reversal rates. To the extent that the factual basis of this claim existed at the time of Bell's trial and direct appeal proceedings, Bell contends that his counsel were deficient for failing to raise such arguments in support of their claim that the death penalty as applied in Virginia is unconstitutional.

Bell presented these claims regarding the alleged defects in the trial and direct appeal stages of his case and his associated ineffective assistance of counsel claim in his state habeas petition, and the Supreme Court of Virginia found that the claims had no merit under settled precedent. *Bell II*, slip op. at 25. Therefore, in order to prevail, Bell must show that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence" presented to the state court. 28 U.S.C.A. § 2254(d)(1), (2).

Bell cannot make this showing with respect to these claims. Bell relies on the Joint Legislative Audit and Review Commission ("JLARC") report, which sets forth a statistical analysis of the

application of the death penalty in Virginia.[32] The JLARC statistics do not prove that geographic location, race, wealth, or some impermissible review factor enters into any capital sentencing decisions, or that such circumstances were a factor in Bell's particular case. *See* JLARC report at III; *see also McCleskey v. Kemp*, 481 U.S. 279, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Both the Supreme Court and the Fourth Circuit have held that statistical information alone is insufficient to prove the types of claims Bell asserts. *See McCleskey*, 481 U.S. at 297, 107 S.Ct. 1756; *Roach v. Martin*, 757 F.2d 1463, 1481 (4th Cir.1985); *Briley v. Booker*, 746 F.2d 225, 227 (4th Cir.1984). Therefore, the Supreme Court of Virginia's determination that Bell's claim on the constitutionality of Virginia's application of the death penalty lacked merit was in accordance with federal law and was not unreasonable. For these same reasons, the state court's decision that the associated ineffective assistance of counsel claim satisfied neither the "performance" nor the "prejudice" prong of *Strickland* was also reasonable. Accordingly, I must deny relief on these claims.

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[32] The JLARC report is the product of a year-long study of capital punishment commissioned by the Virginia General Assembly. Joint Legislative Audit and Review Commission of the Virginia General Assembly, *Review of Virginia's System of Capital Punishment* (2000), available at http://jlarc.state.va.us/reports/rpt274.pdf. The study focuses on "two key aspects of capital punishment in Virginia: the use of prosecutorial discretion by Commonwealth Attorneys in the application of the State's death penalty statutes; and the fairness of the judicial review process for persons who have been sentenced to die." *Id.* at Preface.

Secondly, in another portion of Claim XI, Bell contends that Virginia's post conviction review process violated his constitutional rights under the Fourteenth Amendment because the Supreme Court of Virginia limited him to fifty pages in his state habeas petition, refused to appoint a mental health expert, and determined various disputed facts without an evidentiary hearing. This claim must fail, however, because a challenge to state habeas corpus proceedings cannot provide a basis for federal habeas relief. *See Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998). A federal court "shall entertain an application for a writ of habeas corpus ...only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). "This does not provide a basis for a challenge to a ruling in a state post-conviction proceeding, because the petitioner is not 'detained as a result of a decision of the Supreme Court of Virginia in the state habeas action,' but rather is in custody pursuant to the original trial court." *Orbe v. True*, 233 F.Supp.2d 749, 787 (E.D.Va.2002) (citing *Wright*, 151 F.3d at 159). Accordingly, I must deny relief on this claim.

L. CLAIM XII—UNCONSTITUTIONALITY OF VIRGINIA'S EXECUTION PROCEDURES.

In his final claim for relief, Bell attacks the constitutionality of Virginia's execution procedures. Specifically, he argues that both electrocution and lethal injection, the two execution methods employed in Virginia, violate his Eighth and Fourteenth Amendment rights. He contents that the combination of chemicals used for lethal injection in Virginia—sodium thiopental, pancuronium bromide, and potassium chloride—creates a strong possibility

of unnecessary suffering that is increased by the lack of physician involvement in the execution process, and that electrocution is needlessly cruel and thus offends our evolving standards of decency.

The state argues that this claim is procedurally barred, but I find that the exhaustion requirement has been met and the claim is properly before this court. While Bell did not present this claim in his state habeas petition, he challenged Virginia's execution procedures on direct appeal and the Supreme Court of Virginia decided the claim on the merits. It is well established that "the exhaustion requirement does not demand that a petitioner raise on collateral review a claim that has been fully considered by the state court on direct review." *Baker v. Corcoran*, 220 F.3d 276, 288 (4th Cir.2000) (citing *Brown v. Allen*, 344 U.S. 443, 447, 73 S.Ct. 397, 97 L.Ed. 469 (1953)). As long as a claim has been fairly presented to the state court, the exhaustion requirement is met. *Id.* Thus, because Bell presented this claim on direct appeal, the fact that Bell did not raise it in his state habeas petition does not prevent review in this court. Furthermore, while Bell does present more detail in his federal habeas petition supporting his contention that lethal injection is inhumane, these additional arguments did not "fundamentally alter the legal claim already considered by the state courts" and thus federal habeas review is not precluded. *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

Because this claim was adjudicated on the merits in state court, I must apply the deferential review set out in § 2254(d) and can grant relief only if the state court decision contravened or unreasonably

applied clearly established federal law. In its decision on Bell's execution procedures claim, the Supreme Court of Virginia first explained that it had previously "ruled that execution of prisoners by electrocution does not violate the Eighth Amendment's prohibition against cruel and unusual punishment." *Bell I*, 563 S.E.2d at 715 (citing *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 569 (1993)). The court went on to say that although it had never determined whether lethal injection was unconstitutional, Bell's claim and supporting evidence that lethal injection posed an unwarranted risk of extreme pain and suffering was not sufficient to warrant an evidentiary hearing on the issue. *Id.* The court noted that it rejected this same type of argument when upholding the constitutionality of death by electrocution. *Id.* (citing *Martin v. Commonwealth*, 221 Va. 436, 271 S.E.2d 123, 125 (1980), and *Ramdass*, 437 S.E.2d at 569). The court further noted that pursuant to Virginia's death penalty scheme, Bell has the right to choose between lethal injection and electrocution. *Id.* The court concluded that "[b]ecause Bell has that choice and we have already ruled that execution by electrocution is permissible under the Eighth Amendment, it would be an unnecessary adjudication of a constitutional issue to decide whether lethal injection violates the Eighth Amendment." *Id.*

I find that the state court's decision denying this claim on direct appeal reasonably applies federal law. First, existing precedent holds that electrocution is not an unconstitutional method of execution. *See In re Kemmler*, 136 U.S. 436, 449, 10 S.Ct. 930, 34 L.Ed. 519 (1890); *Poyner v. Murray*, No.

93-6052, 1993 WL 13119345, *2–3, 1993 U.S.App. LEXIS 38227, *6 (4th Cir.1993) (unpublished); *Ralph v. Warden*, 438 F.2d 786, 789 (4th Cir.1970); *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 569 (1993), *vacated in part on other grounds*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). Thus, the Supreme Court of Virginia's holding on that issue certainly squares with federal law.

Secondly, the state court's determination that it was unnecessary to decide the constitutionality of lethal injection given the availability of electrocution as a method of execution was also reasonable. In *Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999), an Arizona inmate argued that execution by lethal gas violated the Eighth Amendment. Under Arizona law, inmates could choose execution by either lethal gas or lethal injection, and LaGrand chose lethal injection. *See id.* at 119, 119 S.Ct. 1018. The Supreme Court held that LaGrand waived his habeas claim that execution by lethal gas was unconstitutional because he had chosen to die by lethal gas. *Id.* The same analysis applies to Bell's case even though he has not yet chosen his form of execution. *See Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001). For Bell's lethal injection claim to be relevant, he would first have to choose it over electrocution, the constitutionality of which has been established by existing precedent. *Id.* If he does so choose lethal injection, however, he waives his right to object to it under *Stewart*. *Id.*

Lastly, thirty-seven states and the federal government authorize execution by lethal injection, and I am aware of no court decision, federal or state,

that has found execution by lethal injection unconstitutional. *See Reid v. Johnson*, 333 F.Supp.2d 543, 552 (E.D.Va.2004) (citing *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004)). Indeed, the several state and federal courts that have considered the issue have concluded that lethal injection is constitutional. *See, e.g., LaGrand v. Lewis*, 883 F.Supp. 469, 470–71 (D.Ariz. 1995) (finding lethal injection constitutional and citing several other cases that have so held), *aff'd*,133 F.3d 1253 (9th Cir.1998); *People v. Snow*, 30 Cal.4th 43, 132 Cal. Rptr.2d 271, 65 P.3d 749, 800–01 (2003); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir.1997) (finding petitioner had failed to demonstrate that Arizona's lethal injection protocol would violate his constitutional rights). Thus, I find the Supreme Court of Virginia's decision on this claim reasonable and deny relief.

As an alternative to granting him relief on this claim, Bell asks this court for an evidentiary hearing based on the new details proffered in his federal habeas petition. First, Bell arguably failed to fully develop the factual basis of his claim in state court, which would preclude an evidentiary hearing on the newly introduced details of his claim. *See* 28 U.S.C.A. § 2254(e)(2). Moreover, even accepting Bell's new facts concerning the pain and terror involved in lethal injection and electrocution as proven, they do not as a matter of law establish an Eighth Amendment violation and thus no evidentiary hearing on this claim is necessary. Death by execution has always involved the possibility of pain and terror, and although our evolving standard of decency may at times require reassessment as to what degree or length is

tolerable, Bell's proffered evidence does not demonstrate that the challenged methods so depart from contemporary notions of civilized conduct that reassessment by this court at this time would be proper.[33] *See Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir.1983). Therefore, Bell's request for an evidentiary hearing on the matter must be denied.

IV. CONCLUSION.

For the reasons stated, it **ORDERED** as follows:

1. The state's motion to dismiss is granted in part and denied in part;
2. An evidentiary hearing will be held on the petitioner's claim that he received ineffective assistance of counsel by virtue of the failure of his attorneys to present available evidence in mitigation at the sentencing phase of his trial; and
3. All other claims for relief presented by the petitioner are denied.

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[33] The Supreme Court recently granted certiorari in a case involving execution by lethal injection. *Hill v. Crosby*, — U.S. —, 126 S.Ct. 1189, 163 L.Ed.2d 1144 (2006). It appears that the issue before the Court is whether a death row inmate can pursue such a claim after his habeas rights have been exhausted. *See Hill v. Crosby*, No. 06-10621, 2006 WL 163607, 2006 U.S.App LEXIS 1674 (11th Cir. Jan. 24, 2006) (holding that action was functional equivalent of successive habeas petition).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division

EDWARD N. BELL, Civil Action No. 7:04CV00752

Petitioner,

VS.

Harrisonburg, Virginia

WILLIAM PAGE TRUE,

RESPONDENT. July 6, 2006

TRANSCRIPT OF COURT'S RULING
BEFORE THE HONORABLE JAMES P. JONES,
UNITED STATES CHIEF DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography. Transcript produced by computer.

[2] THE COURT: Thank you, Counsel, for your presentations. We're going to take a brief recess while I consider my decision in this case.

(Recess at 3:30 p.m. until 4:00 p.m.)

First, I want to thank counsel for their efficient presentation of the evidence over the last two days. I think counsel on both sides acted in the highest tradition of the legal profession and I want to thank you all.

The following will be the Court's findings of fact and conclusions of law.

The essential historic facts and procedural history of this case is set forth in my earlier opinion, dated February 7, 2006, and I will not repeat those facts or history.

I base my factual conclusions on my opportunity to observe the witnesses and make judgment about

their credibility, as well as my review of all of the evidence presented.

To establish ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Without articulating specific guidelines for appropriate attorney conduct, the Supreme Court has explained that **[3]** counsel's performance is deficient where it falls "below an objective standard of reasonableness" as measured by "prevailing professional norms." *Wiggins v. Smith*, 539 US 510, 521, 2003.

I, thus, must judge the reasonableness of the conduct in this case on the facts of this particular case viewed as of the time of counsel's conduct.

Assuming that the petitioner establishes that counsel's performance was deficient, then he must prove prejudice, i.e., "that there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different." *Wiggins*, 539, US, at 3534.

A "reasonable probability" refers to a "probability sufficient to undermine confidence in the outcome." In making this determination, I am required to "reweigh the evidence in aggravation against the totality of available mitigating evidence." That's also a quote from *Wiggins*.

That means, of course, in simpler terms that I must first determine whether the lawyers here representing Mr. Bell were deficient, acted below an objective standard for reasonableness in regard to their conduct in connection with the mitigation phase of Mr. Bell's trial and if I find that it was unreasonable, **[4]** judged by that standard, I still

must determine whether it has been shown that there was prejudice; in other words, that there would have been at least a reasonable probability that there would have been a different result.

Based on the evidence, I do find that counsel's investigation of the mitigation evidence available to them in this case was deficient within a constitutional standard. The evidence show that there were several witnesses, all of whom who testified before me, who would have had mitigation evidence to present had they been adequately determined and investigated by counsel. Dawn Jones, for example, who testified, now Dawn Jones Bailey, testified that she would have been available to testify about favorable aspects of Mr. Bell's character concerning his treatment of his children or his child, at least, as to Ms. Jones; that he was otherwise a good father. While there was some question as to whether she was contacted by defense before trial, I find from the evidence that she was not. Had she been contacted, not only would she have had mitigation evidence to present that would have been relevant, but she would have been available in regard to other factors in the case. Of course, she was a witness for the prosecution. Counsel was unable to effectively **[5]** cross-examine her because they had not interviewed her prior to trial.

Barbara Bell Williams, Mr. Bell's former wife, of course, also was available to testify had she been found and interviewed. She could have come to the trial. Had a Visa and passport and would have testified that Mr. Bell was a loving, decent and hard working person when she knew him in Jamaica; that

he wrote to his daughter and was otherwise a good father.

Carol Baugh Williams would likely have also been discovered had an adequate investigation been made and she would have, likewise, had helpful things to say about Mr. Bell's character. She also, of course, was not discovered or interviewed by defense counsel.

Joanne Nicholson did not testify, although she had been interviewed by Mr. Williams, one of the defense counsel, but not asked to testify. She, likewise, would have been a helpful mitigation witness, not only to talk about Mr. Bell's quality as a father to her grandchildren, but the fact that in her view at least, he had no experience of domestic violence. She would have also been available to rebut the testimony introduced by the prosecution concerning the incident with Mr. Bell's girlfriend in which he made a sexual assault, allegedly. The fact that she indicated to **[6]** counsel that she would rather listen to the evidence than testify is really no excuse for not considering her as a witness where she would be subject to subpoena. There is no indication that she was hostile to Mr. Bell or would have otherwise testified differently than she did in these proceedings at trial.

Precious Henderson, from West Virginia, who was a Jamaican native who knew Mr. Bell and helped him get a job, would also have been available in a proper investigation to testify concerning his work situation, although she, in my opinion, would have been of lesser importance than these other witnesses.

Now, the explanation for not calling these witnesses is, of course, that there was a strategic decision made, that as Mr. Williams testified, that any evidence relating to Mr. Bell's relationships with children or with wives or former girlfriends would be a so-called double edged sword because the prosecution would have been able to make something out of it because of the alleged failure of Mr. Bell to regularly support these children.

Mr. Williams also indicated that he felt that there was also the ground that would show a lack of moral fiber with Mr. Bell because of these multiple relationships, although lead counsel in the case, of [7] course, indicated that that was really not a consideration in making the decision that this evidence would not be presented, that it was a child support issue.

However, strategic decisions have to be based on adequate investigation and counsel had an obligation to adequately investigate evidence in mitigation of guilt. One cannot make a strategic decision absent knowledge of the facts and the facts here were not uncovered through, in my view, deficient performance of counsel.

It is apparently, and I so find, that really, the mitigation aspect of this case was left to Mr. Williams. Mr. Williams was not experienced in capital cases, although he had prior criminal trial experience. This was his first capital case. Of course, he had never handled a capital mitigation case before, but it was left to him to develop this mitigation evidence and he, in turn, relied upon Mr. Stejskal, Dr. Stejskal, and his organization, and I've had an opportunity, of course, to hear evidence from Dr. Stejskal, as well, and I find as a matter of fact

that it was unreasonable to depend upon Dr. Stejskal to do an investigation of the nature required. Dr. Stejskal certainly did not indicate that he was going to [8] undertake any such full investigation and his report which came not too long before trial certainly doesn't indicate that. He did, in fact, develop some potential witnesses. But again, for the reasons I've indicated, counsel really made no effort to follow up and interview these potential valuable witnesses.

As counsel for the petitioner has argued, much of the so-called double-edged sword evidence had already been presented in the state's mitigation case. It was already before the jury and thus, a decision based on a fear that this evidence would be — would thus come to the jury through these mitigation witnesses was unfounded.

It certainly is true that, as the state argues, that the prosecutor would likely have argued that these mitigation witnesses were not to be credited or showed a contrast of Mr. Bell's lack of moral fiber, but the choice that came to counsel because of their inadequate investigation was simply to put on no mitigation evidence at all, which is what, in fact, they did.

Now, I have had taken under advisement the petitioner's request to consider report of their mitigation expert, Ms. Albarus, as well as the affidavits obtained by her and counsel in Jamaica. I [9] decline to consider that evidence and instead, rely on the live witnesses that were presented to me. While it is true that the habeas statute permits the Court to consider affidavits, in this case, I think it would be not proper to do so because counsel for the state is severely disadvantaged by their inability to

cross-examine these witnesses. Whether or not these persons would have been available, for example, to actually have come to trial is not apparent and frankly, would be an important element subject to cross-examination by the state. Even if the Court accepted they had some good things to say about Mr. Bell's character, whether they would have been available to say those things at the time is important and I believe that without the opportunity to cross-examine them, it would not be proper and I decline to entertain those exhibits and will refuse them, as well as the report of Carmeta Albarus, which report contains lengthy recitations of this purported testimony.

The fact that I have concluded as I do, that counsel was constitutionally deficient in their failure to adequately investigate and present mitigating evidence in this case does not end the matter. I must determine that there's a reasonable probability but for these errors that there would have been a different [10] result. To do that, I must weigh the evidence in aggravation against the totality of available mitigating evidence. In this regard, I have determined that prejudice has not been shown.

This was a very difficult case from defense counsel's point of view. I have carefully considered it. While I find that counsel should have done more in presenting this mitigating evidence, I have to say that based on all of the evidence presented, I believe that the jury would have arrived at the same verdict of death, even had this mitigating evidence been presented. Based on that determination, upon a review of all of the evidence in the case, I will deny the petition for habeas corpus and deny relief.

If a notice of appeal is granted, I will grant a certificate of appealability as to this issue. I will enter a final judgment in accord with the Court's decision.

We'll adjourn court.

(Proceedings concluded at 4:25 p.m.)

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter."

/s/ Sonia Ferris October 24, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 7, 2007

No. 06-22
7:04–cv–00752–jpj

EDWARD NATHANIEL BELL
Petitioner - Appellant

v.

LORETTA K. KELLY, Warden, Sussex I State Prison
Respondent - Appellee

ORDER

Appellant has filed a motion to expand the certificate of appealability issued by the district court and a motion for leave to file the motion in a form which exceeds the page limits established by Rule 27(d)(2) of the Federal Rules of Appellate Procedure. Appellee has filed a response in opposition to the motions, and appellant has filed a reply in support of the motions.

The Court grants appellant leave to file an oversized motion and accepts the motion for filing. The Court denies appellant's motion to expand the certificate of appealability issued by the district court.

For the Court,

/s/ Patricia S. Connor
CLERK

FILED: January 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-22
(7:04-cv-00752-jpj)

EDWARD NATHANIEL BELL

Petitioner – Appellant

v.

LORETTA K. KELLY, Warden, Sussex I State Prison

Respondent – Appellee

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Shedd and Judge Duncan.

For the Court
/s/ Patricia S. Connor, Clerk

CONSTITUTION OF THE UNITED STATES

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

* * *

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS
28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *

SUPREME COURT OF VIRGINIA

EDWARD NATHANIEL BELL,

v.

COMMONWEALTH OF VIRGINIA.

Record No. 011777.

JUNE 7, 2002.

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264 Va. 172, 563 S.E.2d 695

Present: All the Justices.

Opinion by Justice CYNTHIA D. KINSER.

A jury convicted Edward Nathaniel Bell of the 1999 capital murder of Sergeant Ricky Lee Timbrook, a law enforcement officer with the Winchester Police Department, when such killing was for the purpose of interfering with the performance of Sergeant Timbrook's official duties.[1] At the conclusion of the penalty phase of a bifurcated trial, the jury recommended that Bell be sentenced

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[1] Bell was also convicted of the use of a firearm in the commission of murder, possession of cocaine with intent to distribute, and possession of a firearm while possessing cocaine. He was sentenced to imprisonment for terms of 3 years, 10 years, and 5 years, respectively, for these convictions, which are not the subject of this appeal.

to death on the capital murder conviction, finding that there is a probability that he would commit criminal acts of violence in the future that would constitute a continuing serious threat to society. *See* Code § 19.2–264.2. After reviewing a post-sentence report prepared pursuant to Code § 19.2–264.5, the circuit court sentenced Bell in accordance with the jury verdict.

Bell now appeals that conviction and his sentence of death. After considering the issues raised by Bell and conducting our mandated review pursuant to Code § 17.1–313(C), we find no error in the judgment of the circuit court and will affirm Bell's conviction of capital murder in violation of Code § 18.2–31(6) and the imposition of the death penalty.

I. FACTS

We will state the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party before the trial court. *Burns v. Commonwealth*, 261 Va. 307, 313, 541 S.E.2d 872, 877, *cert. denied*, — U.S. —, 122 S.Ct. 621, 151 L.Ed.2d 542 (2001); *Jackson v. Commonwealth*, 255 Va. 625, 632, 499 S.E.2d 538, 543 (1998), *cert. denied*, 525 U.S. 1067, 119 S.Ct. 796, 142 L.Ed.2d 658 (1999); *Roach v. Commonwealth*, 251 Va. 324, 329, 468 S.E.2d 98, 101, *cert. denied*, 519 U.S. 951, 117 S.Ct. 365, 136 L.Ed.2d 256 (1996). In doing so, we accord that evidence all inferences fairly deducible from it. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975).

A. Guilt Phase

On the evening of October 29, 1999, Sergeant Timbrook and two probation and parole officers were working together in a program known as Community

Oriented Probation and Parole Services. One aspect of Sergeant Timbrook's responsibilities was to assist the probation officers in making home visits to individuals on probation or parole. On that particular evening, these three individuals were patrolling in an unmarked car in Winchester and were, among other things, searching for Gerrad Wiley, who was wanted for violating the terms of his probation.

The officers went to Wiley's residence on Woodstock Lane in Winchester several times that evening to no avail. Just before midnight, when they returned to Wiley's residence for the sixth time, they saw an individual standing in a grassy area between a trash dumpster and an apartment building. As one of the probation officers and Sergeant Timbrook exited the vehicle and approached that individual, who was later identified as Daniel Charles Spitler, another person, who had "dipped behind in the shadows," began running away. Sergeant Timbrook pursued that individual while calling for assistance on his radio.

Spitler identified the individual who ran from Sergeant Timbrook as Bell. Spitler testified that, on the evening in question, he was in the area of Woodstock Lane for the purpose of obtaining cocaine from Wiley. After no one answered his knock on the door of Wiley's residence, Spitler started walking down a nearby alley where he encountered Bell. Spitler did not tell Bell that he wanted cocaine, but, according to Spitler, Bell "put his hands on [Spitler] like to pat [him] down to check and see if [Spitler] had a wire on [him]." During that encounter, Sergeant Timbrook and the two probation officers arrived in the unmarked vehicle.

When the vehicle's headlights illuminated Spitler and Bell, Spitler started walking toward the headlights, but Bell stepped into the shadows of a building. Spitler identified Sergeant Timbrook as one of the individuals who emerged from the vehicle. According to Spitler, Bell then started running away and Sergeant Timbrook chased after him, yelling "We have one running. Stop." Spitler lost sight of Bell and Sergeant Timbrook when they ran behind a building, but Spitler testified that he heard a shot soon thereafter.

Sergeant Timbrook chased Bell along several streets and down an alley between two houses located at 301 and 303 Piccadilly Street. These houses were separated by a fence approximately two or three feet in height. As Sergeant Timbrook started to climb over the fence, a shot rang out. A police officer, Robert L. Bower, who had responded to Sergeant Timbrook's radio call for assistance, described the incident in this manner:

> [A]s [Sergeant Timbrook] started to cross over, I took my eyes off of him, and directed it toward the subject. I noticed it stopped. And, I saw a, what appeared to be a left shoulder as it stopped. All I could was ... it was like a black material .... As soon as I saw it stop, I looked back at [Sergeant] Timbrook to say something, at which time I heard the shot. And, I saw [Sergeant] Timbrook falling.

Sergeant Timbrook's body was found lying on the ground with his feet close to the fence and his upper torso leaning against a wall. His gun was still in its holster. Sergeant Timbrook was transported to a

local hospital where he was pronounced dead. The cause of death was a single gunshot wound above his right eye, caused by a bullet which was fired from a distance of between six and eighteen inches.

Brad Triplett, one of the probation officers who had been patrolling with Sergeant Timbrook that evening, ran in a parallel direction during part of Sergeant Timbrook's pursuit of Bell. At one street intersection, he saw Sergeant Timbrook running after the "same dark[ly] dressed figure" who had originally fled from Sergeant Timbrook. Triplett described that person's clothing as a "dark black type of jumpsuit, nylon material," with "reflective like stripes on the jacket." Several times during the pursuit, Triplett heard Sergeant Timbrook yelling, "Stop running. Police." He also heard the gunshot.

The police searched the area for the suspect throughout the night by securing a perimeter around the neighborhood where the shooting had occurred and by using a helicopter equipped with a heat-sensitive "Forward Looking Infrared" camera and a spotlight. At one point during the search, Officer Brian King spotted an individual lying on the back steps of a house located at 305 Piccadilly Street.[2] King stated that the person was wearing a dark colored jacket with reflective strips on the sleeves that "li[t] up like a Christmas [t]ree" when he shined his flashlight on the individual. The person then stood up and disappeared behind a bush.

Emily Marlene Williams, who lived at 305 Piccadilly Street, testified that she heard the

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[2] The shooting occurred in the area between 301 and 303 Piccadilly Street.

gunshot on the evening in question and about five minutes later heard a "crash" in the basement of her house. After she told the police about the noise in her basement, the police evacuated her and her family from their home. The following morning, the police discovered Bell, a Jamaican national, hiding in a coal bin in the basement of the Williams' residence. He was wearing a "LUGZ" black nylon jacket and a black beret cap with a gold pin. The jacket had reflective stripes on the sleeves. Spitler identified both of these items of clothing as those that Bell had been wearing on the evening when Sergeant Timbrook was shot. Before Bell was transported from the Williams' residence to the police department, a gunshot residue test was administered to Bell's hands and the recovered particles were subsequently identified as gunshot primer residue.

During a search of the backyard of the Williams' residence the day after Bell was apprehended, a deputy sheriff found a pearl-handled, Smith and Wesson .38 Special double action revolver. The gun was located under the edge of a porch on the Williams' house and was covered with leaves and twigs. Forensic testing established that this handgun fired the bullet that killed Sergeant Timbrook. Forensic testing of DNA that was recovered by swabbing the grips, butt, trigger, and trigger guard of this revolver could not eliminate Bell as a co-contributor of that DNA, which was consistent with a mixture of DNA from at least three individuals.

When questioned by the police after his arrest, Bell admitted that he had been on Woodstock Lane when "a white guy" allegedly began bothering him

for information. Bell said that when a car drove up and a man got out of the car, he "was scared" and ran. He said he did not know who was chasing him or why, and that when he heard a shot fired, he hid in the basement of the house where he was later discovered. Bell denied having a gun. However, while Bell was confined in jail awaiting trial, he told another inmate that he shot Sergeant Timbrook, threw the gun underneath a porch, and then broke into a house and changed clothes in the basement.

Justin William Jones testified that, around nine o'clock on the evening of the shooting, he saw Bell in the vicinity of Piccadilly Street. According to Jones, Bell showed him a revolver and asked if Jones knew of anyone who wanted to buy a weapon. Jones identified the pearl-handled, .38 caliber revolver introduced at trial as the same weapon that Bell had shown him.

The evening Sergeant Timbrook was shot was not the first encounter between Timbrook and Bell. Sergeant Timbrook had arrested Bell for carrying a concealed weapon in May 1997. The following year, in September 1998, Sergeant Timbrook was present during the execution of an Immigration and Naturalization Service order to detain Bell. Eight months later, Sergeant Timbrook assisted in executing a search warrant at Bell's home. Bell was present during that search. In the summer of 1999, one of Bell's friends heard Bell state, as Sergeant Timbrook drove by in a vehicle, "Somebody needs to bust a cap in his ass." Another of Bell's acquaintances testified that she heard Bell say that he would like to see Sergeant Timbrook dead, and that if he ever came face to face with Sergeant Timbrook, he would shoot Sergeant Timbrook in the

head because he knew that Sergeant Timbrook wore a bullet-proof vest.

B. PENALTY PHASE

During the penalty phase, the Commonwealth presented evidence regarding Bell's criminal history. Several law enforcement officers testified about incidents involving Bell. A police officer from Jamaica provided information about Bell's commission of the crimes of assault and destruction of property in 1985. In 1997, an officer with the Winchester Police Department found a .38 caliber handgun concealed in the trunk of a car being driven by Bell. The serial number of the gun had been filed off. An officer with the West Virginia State Police stated that when he stopped Bell for speeding in 1999, Bell gave him a false name. When the officer started to arrest Bell and place him in handcuffs, Bell ran away into a cornfield. Another West Virginia law enforcement officer found five .38 caliber rounds of ammunition on Bell's person during a "stop and frisk" in 1999. Finally, two employees of the jail where Bell was confined while awaiting trial testified that Bell had threatened them.

Another witness, Billy Jo Swartz, testified about an incident in 1997 when Bell grabbed her head and slammed it into his car. He also held a gun to her head. During the same incident, Bell got into a fight with his pregnant girlfriend and knocked her to the ground. Swartz further stated that she had seen Bell with illegal drugs. Other witnesses likewise testified about buying illegal drugs from Bell.

Members of Sergeant Timbrook's family described their relationship with him and the effect

that his death has had on the family. His wife was pregnant with their first child when Sergeant Timbrook was killed. The only evidence that Bell introduced during the penalty phase was from his sister and father.[3]

II. ANALYSIS

A. ASSIGNMENTS OF ERROR WAIVED

Bell assigned 28 errors on appeal, which he has reduced to 16 questions presented. However, he failed to brief several assignments of error. Thus, those alleged errors are waived, and we will not consider them on appeal.[4] *Kasi v. Commonwealth*,

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[3] We will summarize additional facts and material proceedings when necessary to address specific issues.

[4] Bell failed to brief the following assignments of error, as numbered in his opening brief:

No. 1: trial court erred by refusing to move Bell's trial to a different county;

No. 2: trial court erred by refusing to permit Bell to request expert assistance *ex parte* while failing to require the Commonwealth to provide notice of the expert assistance it was seeking;

No. 3: trial court erred by denying Bell's request for an expert to investigate his possible brain damage;

No. 5: trial court erred by denying a Bill of Particulars as to the Commonwealth's basis for alleging that Bell would be a continuing threat to society and for the purpose of challenging the constitutionality of the Commonwealth's capital murder statutes;

No. 8: trial court erred by refusing to exclude evidence of gunshot residue found on Bell's hands;

No. 13: trial court erred by refusing to allow Bell to question prospective jurors concerning their views about race;

No. 16: trial court erred by refusing to give Bell additional peremptory challenges during jury selection;

256 Va. 407, 413, 508 S.E.2d 57, 60 (1998), *cert. denied*, 527 U.S. 1038, 119 S.Ct. 2399, 144 L.Ed.2d 798 (1999).

B. PRETRIAL AND GUILT PHASE ISSUES

1. SPEEDY TRIAL

Bell claims that his statutory and constitutional rights to a speedy trial were violated. He was held in custody continuously from October 30, 1999, the date of his arrest, until his trial commenced on January 16, 2001. During that time, two delays occurred that Bell asserts should not be attributed to him in determining whether his speedy trial rights were violated. We do not agree.

On December 20, 1999, the City of Winchester General District Court found probable cause and certified Bell's capital murder charge to a grand jury. The grand jury subsequently indicted Bell for the capital murder of Sergeant Timbrook. During a hearing on February 18, 2000, Bell and his counsel agreed to a trial date of May 30, 2000 and waived Bell's right to a speedy trial. Bell acknowledges on brief that the period between February 18, 2000, and

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No. 21: trial court erred when it struck juror Haines for cause;

No. 24: trial court erred by permitting the Commonwealth to introduce evidence that was relevant only to Bell's future dangerousness in the community at large;

No. 25: that portion of this assignment of error in which Bell claims that the trial court erred by failing to ensure that the jury was adequately instructed at the penalty phase of his trial; and

No. 27: trial court erred by refusing to permit Bell to question individuals providing victim impact evidence at the sentencing proceeding.

May 30, 2000, should not be included in any speedy trial calculation.

The first delay that Bell claims should not be attributed to him occurred when one of his trial attorneys moved for leave to withdraw as counsel for Bell. Bell's remaining counsel asked for a continuance of the trial date. At a hearing on May 22, 2000, the circuit court granted the motions, appointed an attorney to replace the one withdrawing from Bell's defense team, and continued the trial to September 11, 2000. As reflected in the colloquy between the court and Bell at that hearing and in the court's written order, the court explained to Bell that the continuance was based on his motion and that, therefore, the additional time until his new trial date would be excluded from the calculation regarding whether he was tried within the time frame required by Code § 19.2–243. Bell indicated that he understood and agreed that the continuance granted at his request constituted a waiver of his right to a speedy trial.

Bell now argues that the withdrawal of one of his trial counsel forced him to choose between waiving his speedy trial rights or proceeding to trial with only one attorney. However, the record unequivocally reflects that Bell expressly asked for the continuance resulting in the first delay. Thus, the time attributable to that continuance is subtracted from the total time that elapsed from the finding of probable cause and the commencement of his trial. *See* Code § 19.2–243; *Johnson v. Commonwealth*, 259 Va. 654, 669, 529 S.E.2d 769, 777, *cert. denied*, 531 U.S. 981, 121 S.Ct. 432, 148 L.Ed.2d 439 (2000).

The second delay about which Bell complains involves his request for an independent expert to examine the DNA evidence. At the time that he moved for appointment of the expert, Bell also asked for a continuance of the trial date in order for his expert to have sufficient time to conduct tests. There had been a delay in receiving the results of the Commonwealth's DNA testing. In an order dated August 17, 2000, the circuit court approved the appointment of an independent expert to examine the DNA evidence on behalf of the defendant and granted the motion for a continuance. Over the defendant's objection, the court attributed this second delay to Bell for purposes of determining his speedy trial rights. The court reasoned that, because the Commonwealth's DNA test results were inconclusive, Bell's request for additional testing was a matter of trial tactics and that, therefore, Bell's decision on how to proceed prompted the delay. Bell's trial was then set for January 16, 2001.

We agree with the circuit court's conclusion that the second delay was attributable to Bell. As the court noted, Bell chose to ask for another continuance in order to obtain additional testing of the DNA evidence after learning that the results of the Commonwealth's testing showed that the DNA profile was consistent with a mixture of DNA of at least three individuals. His alternative course at that juncture would have been to proceed to trial in September and attempt to use the Commonwealth's evidence to exculpate himself. Having made a decision involving trial strategy that necessitated another continuance, Bell cannot now complain about that delay or attribute it to the Commonwealth.

Upon excluding the time attributable to both continuances at issue when calculating Bell's speedy trial rights under Code § 19.2–243, we conclude that Bell's trial commenced within the five-month period required by that statute. Thus, Bell's statutory right to a speedy trial was not violated.

Bell also asserts an infringement of his Sixth Amendment right to a speedy trial. Some of the factors to assess in determining whether a defendant's constitutional right to a speedy trial has been violated are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *accord Fowlkes v. Commonwealth*, 218 Va. 763, 766, 240 S.E.2d 662, 664 (1978). Upon considering these factors, we find no violation of Bell's right to a speedy trial under the Sixth Amendment. We have already addressed the reasons for the disputed delays and concluded that those delays were attributable to or acquiesced in by Bell. Furthermore, he has not demonstrated in this record any prejudice resulting from those delays. Thus, the circuit court did not err in denying Bell's motion to dismiss the indictment for the alleged violation of his speedy trial rights.

2. VIENNA CONVENTION

Before his trial, Bell filed a motion to suppress evidence and to dismiss the indictment because of an alleged violation of his rights under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. After hearing testimony from two police officers, the court denied Bell's motion. On appeal,

Bell asserts that the circuit court erred by refusing to suppress his statement to the police because he made that statement before he was advised of his rights to consular notice and assistance under the Vienna Convention.[5]

James G. Prince, an investigative sergeant with the Winchester Police Department, was one of the two law enforcement officers who transported Bell to the Winchester Police Department after he was apprehended in the basement of the Williams' home. Soon after their arrival at the police department, Bell told Prince that he was born in Jamaica and had been in the United States for approximately seven years. The other police officer present with Prince then read Bell his Miranda rights, after which Bell answered questions for approximately 30 minutes.[6] Shortly after the questioning ended, Prince advised Bell that, because he was a Jamaican national, his consulate would be advised of his arrest. According to Prince, Bell immediately stated that he did not want anyone to contact the Jamaican consulate. Prince explained to Bell that it was a "mandatory notification."

On October 31, 1999, at 10:16 P.M. and 10:21 P.M., David Sobonya, a captain with the Winchester Police Department, faxed a notification to the Consulate of Jamaica in Washington, D.C., advising that Bell had been arrested by the Winchester Police

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[5] In contrast to his original motion, Bell does not assert on appeal that the circuit court erred in refusing to dismiss the indictment. *See* Rule 5:17(c).

[6] Bell's statement was recorded on audio-tape and played for the jury at trial. A transcript of the tape recording was introduced into evidence.

Department. Sobonya indicated that he was not aware of any response by the Consulate of Jamaica to the faxed notifications. When asked why there had been a 36-hour delay in making this notification, Sobonya candidly admitted that it was just an oversight. He also acknowledged that he, Prince, and the other police officer who questioned Bell had attended training regarding law enforcement's responsibilities as to foreign nationals who are arrested in this country.

Bell now argues that his rights under the Vienna Convention were violated in three respects: (1) he was not advised of his right to communicate with his consulate, (2) he was not advised of the police department's obligation to notify his consulate until after he made his statement to the police, and (3) there was an inordinate delay in notifying his consulate that he had been arrested. Relying on the decision of the International Court of Justice (ICJ) in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27), he posits that Article 36 of the Vienna Convention creates an individual right to consular notification and access, that a showing of prejudice is not necessary to establish a violation of that article, and that the *LaGrand* court decided the question of appropriate remedies when a violation occurs. Bell also asserts that this Court is "bound" to apply the ICJ's decision in *LaGrand* and that the only remedy that would vindicate the violation of his rights under Article 36 is a new trial in which his statement to the police is suppressed. We do not agree with Bell's position and hold that the circuit court did not err in denying the motion to suppress Bell's statement.

First, we conclude that any rights that Bell has under Article 36 of the Vienna Convention were not

violated. That article provides in subsection (1)(b) that "competent authorities ... shall, without delay, inform the consular post of the sending State" when one of its nationals is arrested or detained pending trial, and shall also "inform the person concerned without delay of his rights under this sub paragraph." The record in this case demonstrates that the Winchester Police Department complied with the requirements of this subsection. Prince advised Bell that the Consulate of Jamaica would be notified of Bell's arrest and that notification, in fact, occurred within approximately 36 hours after Bell was taken into custody.

The provisions of Article 36 do not mandate immediate notification, nor do they necessarily require consular notification before an arrestee is advised of Miranda rights and agrees to waive those rights by answering questions. Instead, Article 36 simply requires that the notification be made "without delay." Thus, we conclude that the lapse of 36 hours was not unreasonable. *Cf. County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (probable cause finding within 48 hours of warrantless arrest generally satisfies requirement that judicial officer make probable cause determination promptly). Notably, the delay in the *LaGrand* case that prompted the ICJ to find that the United States had breached its obligations under Article 36 to the LaGrand brothers and to the Federal Republic of Germany was more than 16 years. In fact, the United States did not notify the LaGrand brothers of their right to consular access until after the completion of proceedings for post-conviction relief. Given the fact that Bell objected to any notification being sent to

his consulate, we likewise find no violation of Article 36 arising from the fact that Prince did not expressly advise Bell of any rights he may have under this article.

Second, we conclude that the ICJ, contrary to Bell's assertion, did not hold that Article 36 of the Vienna Convention creates legally enforceable individual rights that a defendant may assert in a state criminal proceeding to reverse a conviction. Instead, the ICJ stated that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, *may be invoked in [the ICJ] by the national State* of the detained person." *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104, —— (June 27) (emphasis added). The ICJ also held that if the United States should fail in its obligation under Article 36, then the United States should allow review of the conviction and sentence by taking into account the violation of the rights set forth in the Vienna Convention. However, the ICJ recognized that the "obligation can be carried out in various ways" and that "[t]he choice of means must be left to the United States." *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104, —— (June 27).

This acknowledgement by the ICJ reflects the fact that, in the absence of a clear statement to the contrary, procedural rules of a forum State govern the implementation of a treaty in that State. *Breard v. Greene*, 523 U.S. 371, 375, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988); *Société Nationale Industrielle Aerospatiale v. United States Dist. Court for*

Southern Dist. of Iowa, 482 U.S. 522, 539, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987)). This principle is also evident in the provisions of Article 36(2). That subsection provides that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State," provided that those "laws and regulations ... enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

In criminal proceedings in the receiving State, i.e., the United States, a harmless error analysis is routinely used when deciding whether to suppress a defendant's statement made as a result of a violation of the Fifth Amendment right against self-incrimination. *See, e.g., Milton v. Wainwright*, 407 U.S. 371, 372, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); *United States v. Ping*, 555 F.2d 1069, 1077 (2d Cir.1977); *Harryman v. Estelle*, 616 F.2d 870, 875 (5th Cir.), *cert. denied*, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980); *United States v. Carter*, 804 F.2d 487, 489 (8th Cir.1986); *United States v. Lemon*, 550 F.2d 467, 471 (9th Cir.1977). The same analysis should apply when a defendant seeks to suppress a statement because of an alleged violation of rights conferred pursuant to Article 36 of the Vienna Convention. Thus, in the present case, even if Bell's rights under Article 36 were violated because the police questioned him prior to advising him of his rights to consular notice and access, we conclude that any such error was harmless. The evidence of Bell's guilt, as already summarized in this opinion, is overwhelming. Furthermore, Bell has not alleged, much less demonstrated, any prejudice resulting from the fact that approximately 36 hours elapsed

before his consulate was notified of his arrest, nor has he asserted that he would not have answered the police officers' questions if he had first been advised of his right to communicate with his consulate. Bell, after all, objected to his consulate receiving notice of his arrest.

Finally, even if Article 36 creates legally enforceable individual rights, it does not provide—explicitly or otherwise—that a violation of those rights should be remedied by suppression of evidence. *See United States v. Li*, 206 F.3d 56, 61 (1st Cir.) (en banc), *cert. denied*, 531 U.S. 956, 121 S.Ct. 378 (2000); *United States v. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1125–26 (C.D.Ill. 1999), *aff'd*, 226 F.3d 616 (7th Cir.), *cert. denied*, 531 U.S. 1026, 121 S.Ct. 599, 148 L.Ed.2d 513 (2000). Such a remedy is generally not available when a fundamental right is not implicated. *Id.* The language of Article 36 does not create a fundamental right comparable to the privilege against self-incrimination. *Id.* Thus, Bell's claim that the alleged violation of his rights under Article 36 should be remedied by suppressing his statement to the police finds no support in the provisions of the Vienna Convention.

3. SEARCH OF VEHICLE

On November 11, 1999, Arthur Edward Clarke advised the Winchester Police Department that he had seen Bell exiting a 1997 Chevrolet Cavalier automobile on the morning before Sergeant Timbrook was shot. Clarke stated that Bell got out of the car, walked behind an apartment building located on Woodstock Lane, and proceeded down an alley. Bell did not live at that apartment complex.

When Clarke called the police in November, the vehicle was still parked at the same apartment building, which was managed by Clarke. Clarke connected Bell with the vehicle and the shooting of Sergeant Timbrook after another tenant told Clarke that Bell's girlfriend had tried to break into the vehicle.

While arranging to have the vehicle towed to the police department, the police learned that the vehicle was not registered to Bell. At about the same time, the police also received information from a finance company holding a lien on the automobile's title that the vehicle had been stolen from an "Impound Lot" in Front Royal and needed to be taken to the police department so the lienholder's repossession agent could pick up the vehicle. The lienholder subsequently gave the Winchester Police Department permission to search the automobile. Using keys found in Bell's possessions when he was arrested, the police gained access to the vehicle and, while searching it, found three .38 caliber Federal Hydra–Shok bullets in a black nylon cartridge case. The bullets were similar to the one that killed Sergeant Timbrook.[7]

The owner of the vehicle, Michael Carter Johnson, testified that he never gave Bell permission to drive his automobile. However, Johnson acknowledged that the vehicle had been impounded and that his girlfriend had retrieved the vehicle from the impoundment lot. The girlfriend admitted that she loaned Bell the automobile on two occasions. The first time, Bell returned the vehicle, but he did

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[7] A search of Bell's home uncovered an empty box of the same brand and caliber cartridges.

not do so the second time, despite her repeated requests.

Bell moved to suppress the introduction of the evidence seized during the search of the vehicle. The circuit court denied the motion, finding that Bell lacked standing to object to the search of the automobile. On appeal, Bell argues that he had a reasonable expectation of privacy in the vehicle because he had been driving it, had the keys in his possession, and had parked it in a private parking lot, leaving it locked with his belongings inside. We do not agree.

Bell bore the burden of proving that he had a legitimate expectation of privacy in the vehicle so as to confer standing to challenge the search. *Barnes v. Commonwealth*, 234 Va. 130, 135, 360 S.E.2d 196, 200 (1987), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988). He did not carry that burden. Bell did not own the vehicle, and he did not establish that he was authorized to have the car in his possession when it was searched. *See United States v. Wellons*, 32 F.3d 117, 119 (4th Cir.1994) (unauthorized driver of rental car had no legitimate expectation of privacy in the vehicle), *cert. denied*, 513 U.S. 1157, 115 S.Ct. 1115, 130 L.Ed.2d 1079 (1995); *United States v. Hargrove*, 647 F.2d 411, 413 (4th Cir.1981) ("person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects"). Bell had left the vehicle parked at an apartment building where he did not live. At the time of the search, the lienholder was in the process of repossessing the vehicle and gave the police consent to conduct the search. Thus, we conclude that the circuit court correctly denied Bell's motion

to suppress. He lacked the requisite standing to challenge the search of the vehicle.

4. GRAND JURY

Bell contends that the circuit court erred by refusing to dismiss the indictment because the grand jury was exposed to prejudicial information. On the day that the grand jury indicted Bell, flyers containing information about Sergeant Timbrook's death, his family, and a scholarship fund for his unborn child were posted on some of the doors to the courthouse. Bell asserts that the grand jurors could not have avoided seeing these flyers when they entered the courthouse and were therefore biased against him.

We find no merit in this argument. Bell's contention that the grand jurors were somehow influenced to indict him because of these flyers is pure speculation. The flyers did not even mention Bell. Furthermore, the general district court's finding of probable cause at the preliminary hearing and the petit jury's subsequent guilty verdict demonstrate that there was probable cause to charge Bell and that he was in fact guilty as charged beyond a reasonable doubt. *See United States v. Mechanik*, 475 U.S. 66, 70, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). Thus, we conclude that the circuit court's denial of Bell's motion to dismiss the indictment because of the presence of these flyers in the courthouse was not error.

5. JURY SELECTION

Bell contends that the circuit court erred in refusing to strike three jurors for cause. As we have stated on many occasions, a trial court is in the superior position, because that court sees and hears

each prospective juror's responses to questions during *voir dire*, to determine whether a prospective juror would be prevented from or impaired in performing the duties of a juror in accordance with the court's instructions and the juror's oath. *Green v. Commonwealth*, 262 Va. 105, 115–16, 546 S.E.2d 446, 451 (2001) (citing *Lovitt v. Commonwealth*, 260 Va. 497, 510, 537 S.E.2d 866, 875 (2000), *cert. denied*, — U.S. —, 122 S.Ct. 41, 151 L.Ed.2d 14 (2001); *Vinson v. Commonwealth*, 258 Va. 459, 467, 522 S.E.2d 170, 176 (1999), *cert. denied*, 530 U.S. 1218, 120 S.Ct. 2226, 147 L.Ed.2d 257 (2000); *Stewart v. Commonwealth*, 245 Va. 222, 234, 427 S.E.2d 394, 402, *cert. denied*, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993)). Thus, we give deference to a trial court's determination whether to exclude a juror for cause. 262 Va. at 115, 546 S.E.2d at 451. And, we will not disturb a trial court's refusal to exclude a juror for cause unless that decision constitutes manifest error. *Id.* at 116, 546 S.E.2d at 451 (citing *Clagett v. Commonwealth*, 252 Va. 79, 90, 472 S.E.2d 263, 269 (1996), *cert. denied*, 519 U.S. 1122, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997); *Roach v. Commonwealth*, 251 Va. 324, 343, 468 S.E.2d 98, 109, *cert. denied*, 519 U.S. 951, 117 S.Ct. 365, 136 L.Ed.2d 256 (1996); *Stockton v. Commonwealth*, 241 Va. 192, 200, 402 S.E.2d 196, 200, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991)). Guided by these principles, we will examine each of the jurors about whom Bell complains.

(a) Juror Golding

Bell assigns error to the circuit court's denial of his motion to strike juror Golding for cause. However, the court later excused this juror because

she could not arrange for child care during the trial. Bell did not object to the court's decision, which moots this assignment of error.[8]

(b) Juror Patton

Bell objected to the seating of juror Patton because, when asked whether he had formed an opinion about the guilt or innocence of Bell, this juror initially answered, "Not sure really. Kind of do and kind of don't." After this initial response, juror Patton was asked the following series of questions:

> MR. FISCHEL [Bell's attorney]: Mr. Patton, you seemed to indicate that you might have formed an opinion about the ultimate question about whether or not Mr. Bell is guilty of this offense from what you learned from the media; is that correct? You are uncertain?
>
> MR. PATTON: Kind of uncertain. I mean, I read brief bites of it. Remember it being in the news a year ago.
>
> MR. FISCHEL: Let's assume that whatever news source [you] received reported what they got very accurately, do you think that either the City Police or the Prosecutor[']s Office or the Defense, through us, gave them all of the information they have about the case?
>
> MR. PATTON: I don't guess.

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[8] Apparently, neither Bell nor the Commonwealth realized that juror Golding was excused from the jury panel since they both argued the merits of this assignment of error.

MR. FISCHEL: Would you think that is unlikely?

MR. PATTON: I don't know.

MR. FISCHEL: If you heard more in this trial than was reported in the papers, could you fairly and impartially assess that information to determine whether or not Mr. Bell is guilty?

MR. PATTON: I suppose.

MR. FISCHEL: You do agree, I think you said, that there is a presumption of innocence?

MR. PATTON: I guess. I wouldn't be here.

MR. FISCHEL: That is your purpose?

MR. PATTON: Right.

MR. FISCHEL: And, you understand that first there has to be evidence, and then instructions and then a decision?

MR. PATTON: Right.

THE COURT: You have heard the Judge ask you and tell you that the fact that [Bell] has been arrested and indicted, that is not evidence?

MR. PATTON: Right.

MR. FISCHEL: That is no more powerful than the newspaper articles?

MR. PATTON: Right.

MR. FISCHEL: That is the reason we are all here.

MR. PATTON: Right.

* * *

> MR. FISCHEL: The point is: A few moments ago you gave us a maybe, maybe not answer? But, in analyzing the questions that I just asked you: Can you now tell us more clearly whether you really have formed an opinion about Mr. Bell's guilt or innocence?
>
> [MR.] PATTON: To be honest with you, about a year ago is when I gave that any thought. Other than that, I really haven't thought about it. The only way I knew about the case was from the paper. I had an opinion about it, but I don't know all of the circumstances. I can't remember all of the circumstances. To be honest with you, I think I can listen to both sides before I get an opinion. If that is what you are trying to get.

Upon considering juror Patton's *voir dire* as a whole and not just isolated statements, *see Green*, 262 Va. at 116, 546 S.E.2d at 451, we conclude that he could sit as a fair and impartial juror. Thus, the circuit court did not abuse its discretion in refusing to strike this juror for cause.

(c) Juror Estep

The morning after Sergeant Timbrook was shot, juror Estep's mother called him at college, where he was studying criminal justice, and told him about the incident. She also sent him newspaper clippings about it. One of Estep's best friends was a correctional officer and worked where Bell was being detained. In a telephone conversation with his friend, Estep inquired whether his friend had seen Bell. The friend indicated that he had, but Estep

and his friend did not discuss Bell or the case any further.

When questioned about the conversation, Estep stated, "It wasn't as if I called him and was picking his brain to see what he knew." Estep acknowledged that his interest in criminal justice "sparked [his] interest" in this case, but he stated that his career goal to work as a law enforcement officer or an insurance company investigator would not affect his ability to sit as a fair and impartial juror. When asked to describe his view of somebody who would commit an offense such as the one at issue, Estep stated, "I wouldn't say madman. You know, just kind of your Hollywood type that you would see in the movies."

In denying Bell's motion to strike juror Estep for cause, the circuit court made the following findings:

> THE COURT: I do think Mr. Estep has given candid and forthright responses. I think this is the type of case which is going to interest any number of people for a lot of reasons. It is a big case, if you want to put it that way. It is the type of thing that citizens who are interested in the affairs of the community would, indeed, be interested in for any number of reasons.
>
> Mr. Estep has particular interest.
>
> And,
>
> that is he is a criminal justice major and I understand why it would be of interest for him. That is the circumstances and the people involved.

> He did indicate that he, when he first heard about it he had a preconceived notion of what the defendant would be like. He also readily acknowledged that preconceived notion could be wrong. And, the way I read it, he really didn't give much weight to that preconceived notion at all. I suppose any time you are reading about a set of circumstances of which you are not personally involved, or about people that you do not know, all of us form some sort of notion about what happened or something about the people involved. That can be readily dispelled.
>
> That is the way I read Mr. Estep. He acknowledged those things, but he also indicated through his responses, that he understands his responsibilities as a juror and that he can hear the case and decide the case fairly and impartially.
>
> Just because he has particular interest in this field doesn't disqualify him. And,[from] his responses, the question he asks his friend about Mr. Bell was fairly benign and did not go into any details. So, I don't see how that really prejudices him.

We agree with these conclusions. And, the record supports the court's findings. Thus, the circuit court did not abuse its discretion in refusing to strike juror Estep.

6. *Voir Dire* Questions

In a multifarious argument, Bell asserts that the circuit court erred when it refused to allow Bell to conduct individual *voir dire* of prospective jurors, denied his motion to prohibit the use of leading

questions during *voir dire*, restricted the questions that Bell's counsel could ask prospective jurors, and used leading questions with regard to matters relevant to prospective jurors' impartiality. We find no merit in any of these assertions.

First, Bell does not have a constitutional right to individual *voir dire*. *Cherrix v. Commonwealth*, 257 Va. 292, 300, 513 S.E.2d 642, 647 (citing *Stewart*, 245 Va. at 229, 427 S.E.2d at 399), *cert. denied*, 528 U.S. 873, 120 S.Ct. 177 (1999). Here, the circuit court permitted extensive questioning of the prospective jurors with regard to the factors listed in Code § 8.01–358, and those questions were sufficient to preserve Bell's right to a fair and impartial jury. Thus, the court did not err in refusing to allow individual *voir dire*.

Bell next contends that the circuit court improperly rehabilitated prospective jurors Battaile, Anderson, Loy, Wood, Janelle, Funkhouser, and Haines. Initially, we note that juror Loy was excused for cause without objection by Bell, and that Bell did not object to the seating of jurors Battaile, Anderson, Wood, and Funkhouser. Thus, any claim on appeal regarding those jurors is waived. *See* Rule 5:25.

Jurors Janelle and Haines were struck for cause over Bell's objection. Janelle had stated that she could not impose the death penalty under any circumstances. Haines had given inconsistent responses to several questions with regard to not only whether she could consider imposing the death penalty but also whether she had formed an opinion about Bell's guilt or innocence. However, Bell's assignment of error does not challenge the merit of

the court's decision to strike these two jurors.[9] Instead, he attacks the court's alleged use of leading questions. But, we do not find any objection by Bell to the court's questions during the voir dire of Janelle and Haines. *See* Rule 5:25. Furthermore, we conclude that the circuit court did not ask improper leading questions of these two jurors. The court, as well as counsel, struggled to ascertain the jurors' positions on certain issues because of their repeated inconsistent answers.

Finally, Bell claims that the court erred by sustaining objections to the following questions: (1) whether the jurors had any thoughts about what natural life would mean if serving a life sentence or whether there is anything about natural life rather than death that would make it a lighter sentence; (2) whether any juror would be disturbed if Bell decided not to introduce any evidence; (3) whether there are any crimes for which only a death penalty is appropriate; and (4) whether the jurors believed, without any hesitation or doubt, that Bell is presumed to be innocent. We conclude that the court properly refused to allow Bell to ask these particular questions because they were confusing and called for speculation by the jurors. *See Mueller v. Commonwealth*, 244 Va. 386, 400, 422 S.E.2d 380, 389–90 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). Bell had no right to propound any question he wished. *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct.

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[9] Notably, Bell assigned error to the court's decision to strike juror Haines for cause, but that is one of the assignments of error Bell failed to brief. *See* footnote 4, *supra*.

744, 79 L.Ed.2d 202 (1984). The circuit court explained the relevant legal principles, asked appropriate questions to ensure that the jurors understood those principles and could apply them to the case, and afforded Bell a full and fair opportunity to ascertain whether jurors could "stand indifferent in the cause." Code § 8.01–358.

7. RACIAL COMPOSITION OF VENIRE

Bell assigns error to the circuit court's denial of his motion to strike the jury array and impanel a new venire. He claims that, because there were only two Black individuals in the venire of 50 people, while the Black population of Winchester is 10.5 percent of the total population, he was denied his Sixth Amendment right to select a jury from a representative cross-section of the community. The circuit court denied Bell's motion because he failed to show that there had been a systematic exclusion of Black members of the community from the venire. Instead, the court found that the jury selection system was random.

Systematic exclusion of a "distinctive group in the community" must be shown in order to establish that a defendant's constitutional right to a fair jury selection system has been violated. *Watkins v. Commonwealth*, 238 Va. 341, 347, 385 S.E.2d 50, 53 (1989) (citing *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1797 (1990). As the court correctly held, Bell did not establish a systematic exclusion of any distinctive group in the community. Thus, we conclude that the court did not err in denying Bell's motion.

8. EVIDENCE OF OTHER SUSPECTS

Bell's defense theory rested on his claim that three people were involved in the chase during which Sergeant Timbrook was shot: Bell, Sergeant Timbrook, and an unidentified gunman. Thus, he proposed to question some of the police officers about other suspects who were investigated by asking what the police were told and what they did as a result of that information. Bell claimed that he was not offering this testimony for the truth of the assertions but to determine what the police did with the information that they gathered about other potential suspects. The circuit court refused to allow this type of questioning because it would have elicited responses based on hearsay.

Although Bell did not proffer any testimony but only advised the court as to the nature of the questions he wished to ask, we agree with the circuit court's conclusion that any question requiring a police officer to state what he was told regarding other possible suspects would elicit hearsay. The court, however, advised Bell that he could present evidence about other suspects so long as it was admissible under the rules of evidence, and that he could ask whether blood samples taken from those suspects had been tested. We also note that Bell did establish that Captain Sobonya had received both oral and written information about other suspects. Only when Bell asked Sobonya about the basis for having issued a "look out" for a certain vehicle did the court sustain the Commonwealth's hearsay objection. Thus, we conclude that the circuit court did not err in refusing to allow Bell to elicit hearsay testimony about other suspects from police officers.

9. EVIDENCE OF BELL'S PRIOR POSSESSION OF A FIREARM

Over Bell's objection, the Commonwealth introduced evidence during the guilt phase of the trial that Sergeant Timbrook had arrested Bell in May 1997 for carrying a concealed weapon and that Bell had been convicted of that charge. Bell did not object to admission of the fact that Sergeant Timbrook had previously arrested Bell on a misdemeanor charge and that Bell had been convicted of the charge, but he objected to the specific charge being identified. The Commonwealth offered this evidence to establish Bell's motive for killing Sergeant Timbrook; namely, that if Sergeant Timbrook had apprehended Bell in possession of the .38 caliber revolver, Sergeant Timbrook could have charged him with a felony because it would have been Bell's second firearms offense, and that such a charge would have adversely affected Bell's pending appeal regarding deportation.[10]

Evidence of other crimes is admissible if it tends to prove any relevant element of the offense charged, such as motive, or the conduct and feeling of the accused toward the victim. *See, e.g., Satcher v. Commonwealth*, 244 Va. 220, 230, 421 S.E.2d 821, 828 (1992), *cert. denied*, 507 U.S. 933, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993). The evidence

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[10] Bell had been convicted for the offense of carrying a concealed weapon in August 1997. Consequently, the Immigration and Naturalization Service commenced administrative proceedings to determine whether Bell could remain in the United States. After several hearings in the immigration court, Bell was scheduled for a removal proceeding on November 5, 1999. That proceeding never took place because he was arrested on the present charge.

regarding the concealed weapon charge and conviction was relevant to the Commonwealth's theory of motive and was therefore admissible for that purpose. The circuit court instructed the jury that it could consider the evidence only as evidence of Bell's intent or motive. Thus, we conclude that the court did not abuse its discretion in admitting this evidence.

10. UNIFORMED LAW ENFORCEMENT OFFICERS IN THE COURTROOM

Bell contends that the circuit court erred by denying his motion to prohibit law enforcement officers from wearing their uniforms when attending the trial as spectators. The court did not actually deny his motion in full. Instead, the court ruled that any officer involved in the trial as a witness, bailiff, or security guard could wear a uniform. The court further held that it would not prevent any officer who was on duty from coming into the courtroom while in uniform. However, the court recognized that if too many officers attended the trial as spectators while in uniform, it could create "an oppressive atmosphere." So, the court stated that it would address that situation if and when it occurred. Apparently, no such problem ever developed because Bell never raised an objection that too many uniformed officers were spectators in the courtroom. Therefore, we find no error in the court's ruling on this issue.

C. PENALTY PHASE ISSUES

1. APPOINTMENT OF EXPERT TO TESTIFY REGARDING CONDITIONS OF CONFINEMENT

Bell assigns error to the circuit court's denial of his motion for appointment of a correctional

specialist as an expert to provide testimony regarding the conditions of confinement under which Bell would be housed if he were sentenced to a term of imprisonment for life. Bell claims that he needed this expert to review information about Bell, to assess his likelihood of being a future danger in prison, and to testify concerning the correctional systems used in a maximum security prison to manage inmates and prevent acts of violence.

Recognizing that this Court has rejected the relevancy of this type of evidence, *see Burns*, 261 Va. at 340, 541 S.E.2d at 893; *Cherrix*, 257 Va. at 310, 513 S.E.2d at 653, Bell, nevertheless, urges this Court to reexamine this issue because, in his view, our rulings are inconsistent with decisions of the United States Supreme Court and because trial courts in Virginia are not consistently following the decisions in *Cherrix* and *Burns*. Bell asserts that evidence concerning the prison conditions in which he would serve a life sentence is relevant not only in mitigation and in rebuttal to the Commonwealth's evidence of future dangerousness, but also to his "future adaptability" to prison life. A jury, argues Bell, cannot assess a defendant's likelihood of adjusting to life in prison if evidence describing the conditions of confinement is excluded from the jury's consideration. According to Bell, the "common thread" running through the decisions of the United States Supreme Court in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), is "the Court's recognition that many inmates who would be dangerous if released are not

dangerous when confined to the 'structured environment' of prison."

In *Skipper*, the defendant sought to introduce testimony from two jailers and a "regular visitor" to the jail regarding the defendant's good adjustment during the time he had spent in confinement. 476 U.S. at 3, 106 S.Ct. 1669. The only question before the Supreme Court was "whether the exclusion from the sentencing hearing of the testimony [the defendant] proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived [the defendant] of his right to place before the sentencer relevant evidence in mitigation of punishment." *Id.* at 4, 106 S.Ct. 1669. In holding that the trial court's exclusion of this evidence impeded the sentencing jury's ability to fulfill its task of considering all relevant evidence concerning the character and record of the defendant, the Court specifically stated that it was not "hold[ing] that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating." *Id.* at 7 n. 2, 106 S.Ct. 1669.

The Supreme Court, in *Williams*, found that the defendant's counsel rendered ineffective assistance, in part, because counsel failed to introduce evidence at sentencing from two prison officials who described the defendant "as among the inmates 'least likely to act in a violent, dangerous or provocative way.'" 529 U.S. at 396, 120 S.Ct. 1495. Counsel also failed to introduce evidence at sentencing from two experts who had testified at trial for the prosecution. In their trial testimony, they had opined that there was a "high probability" that the defendant would pose a continuing threat to society. *Id.* at 368–69, 120 S.Ct.

1495. Those experts, however, also surmised that the defendant would not pose a danger to society if kept in a "structured environment," but the defendant's counsel failed to elicit that opinion at sentencing. *Id.* at 371, 120 S.Ct. 1495.

Finally, in *Simmons*, the issue was whether the Due Process Clause requires a sentencing jury to be informed that a defendant is parole ineligible when that defendant's future dangerousness is at issue. 512 U.S. at 163–ob64, 114 S.Ct. 2187. Reiterating that a "defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors ...that a jury may consider in fixing appropriate punishment[,]" the Court concluded that "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that [the defendant] never will be released on parole." *Id.*

Contrary to Bell's assertion, our decisions in *Cherrix* and *Burns* are not inconsistent with these three cases. To use Bell's term, the "common thread" in these cases is that evidence peculiar to a defendant's character, history and background is relevant to the future dangerousness inquiry and should not be excluded from a jury's consideration. This includes evidence relating to a defendant's current adjustment to the conditions of confinement. As the Court stated in *Skipper*, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of ...character that is by its nature relevant to the sentencing determination." 476 U.S. at 7, 106 S.Ct. 1669. But, as we had already stated, "[e]vidence regarding the general nature of prison life in a maximum security facility is not relevant to that

inquiry, even when offered in rebuttal to evidence of future dangerousness." *Burns*, 261 Va. at 340, 541 S.E.2d at 893.

While we do not dispute that Bell's "future adaptability" in terms of his disposition to adjust to prison life is relevant to the future dangerousness inquiry, Bell acknowledged on brief that the individual that he sought to have appointed has been qualified previously as an expert in prison operations and classification. The testimony that Bell sought to introduce through the expert concerned the conditions of prison life and the kind of security features utilized in a maximum security facility. That is the same kind of evidence that we have previously rejected as not relevant to the future dangerousness inquiry. *See Burns*, 261 Va. at 340, 541 S.E.2d at 893; *Cherrix*, 257 Va. at 310, 513 S.E.2d at 653. Nor is such general evidence, not specific to Bell, relevant to his "future adaptability" or as a foundation for an expert opinion on that issue. Thus, we conclude that the circuit court did not err in denying Bell's motion. Bell failed to show a "particularized need" for this expert. *Lenz v. Commonwealth*, 261 Va. 451, 462, 544 S.E.2d 299, 305, *cert. denied*, — U.S. —, 122 S.Ct. 481, 151 L.Ed.2d 395 (2001). In light of the inadmissibility of the evidence that Bell sought to introduce through the expert, he also failed to establish how he would be prejudiced by the lack of the expert's assistance. *See id.*

2. EVIDENCE OF UNADJUDICATED CRIMINAL CONDUCT

Bell contends that the admission of evidence regarding unadjudicated criminal conduct during the

penalty phase of his trial violated his rights under the Eighth Amendment and deprived him of life without due process of law. We have previously decided this issue adversely to Bell's position. *See, e.g., Lenz*, 261 Va. at 459, 544 S.E.2d at 303; *Goins v. Commonwealth*, 251 Va. 442, 453, 470 S.E.2d 114, 122, *cert. denied*, 519 U.S. 887, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996); *Williams v. Commonwealth*, 248 Va. 528, 536, 450 S.E.2d 365, 371 (1994), *cert. denied*, 515 U.S. 1161, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995); *Satcher*, 244 Va. at 228, 421 S.E.2d at 826; *Stockton*, 241 Va. at 210, 402 S.E.2d at 206; *Watkins*, 238 Va. at 352, 385 S.E.2d at 56. Bell presents no compelling reason why we should depart from our prior rulings.

3. EVIDENCE REGARDING EXECUTION PROCEDURE

Bell contends that the circuit court's denial of his motion to conduct an evidentiary hearing regarding the Commonwealth's methods of execution violated his rights under the Eighth and Fourteenth Amendments. He also contends that the court erred by refusing to prohibit death penalty proceedings because the imposition of the death penalty as currently applied in Virginia does not comport with evolving standards of decency.

We have already ruled that execution of prisoners by electrocution does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Ramdass v. Commonwealth*, 246 Va. 413, 419, 437 S.E.2d 566, 569 (1993), *vacated in part on other grounds*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994), *cert. denied after remand*, 514 U.S. 1085, 115 S.Ct. 1800, 131 L.Ed.2d 727 (1995); *Stockton*, 241 Va. at 215, 402 S.E.2d at 209–10;

Martin v. Commonwealth, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980); *Hart v. Commonwealth*, 131 Va. 726, 743–44, 109 S.E. 582, 587 (1921). While this Court has not specifically determined whether execution by lethal injection likewise does not constitute cruel and unusual punishment, the basis of Bell's motion and the affidavit evidence he proffered in support of the motion allege that the Commonwealth's current procedures for administering a lethal injection as a means of execution pose substantial and unwarranted risks of subjecting a prisoner to extreme physical pain and suffering during the execution. This is the same type of allegation that this Court rejected when upholding the constitutionality of death by electrocution. *See Martin*, 221 Va. at 439, 271 S.E.2d at 125. *See also Ramdass*, 246 Va. at 419, 437 S.E.2d at 569.[11] Without more, we conclude that Bell was not entitled to an evidentiary hearing on this issue. *See Dawson v. State*, 274 Ga. 327, 554 S.E.2d 137, 144 (2001) (recognizing lethal injection as reflective of "societal consensus that the 'science of the present day' has provided a less painful, less barbarous means for taking the life of condemned prisoners").

Furthermore, pursuant to the provisions of Code § 53.1–234, Bell has the right to choose whether his

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[11] One of the affidavits proffered by Bell regarding electrocution was from Dr. Harold Hillman. In a similar affidavit submitted in *Ramdass*, Dr. Hillman stated that execution by lethal injection, if properly performed, is substantially less painful than execution by electrocution. (That particular affidavit was not individually cited in our opinion in *Ramdass*, but it was included in the joint appendix, pp. 1265–71, filed with the appeal in that case.)

execution will be by lethal injection or by electrocution. Because Bell has that choice and we have already ruled that execution by electrocution is permissible under the Eighth Amendment, it would be an unnecessary adjudication of a constitutional issue to decide whether lethal injection violates the Eighth Amendment. *See Bissell v. Commonwealth*, 199 Va. 397, 400, 100 S.E.2d 1, 3 (1957). We decline to do so, and likewise cannot say that the circuit court erred in denying Bell's motion for an evidentiary hearing to decide the constitutionality of lethal injection as a method of execution. Thus, we find no error in the court's denial of Bell's motion.

4. CONSTITUTIONALITY OF DEATH PENALTY AS APPLIED IN VIRGINIA

Bell asserts several reasons why the death penalty is unconstitutional as applied in Virginia. We have previously rejected his arguments: (1) future dangerousness predicate is unreliable and vague-rejected in *Remington v. Commonwealth*, 262 Va. 333, 355, 551 S.E.2d 620, 626 (2001), *cert. denied*, — U.S. —, 122 S.Ct. 1928 (2002); (2) use of unadjudicated criminal conduct violates requirement of heightened reliability-rejected in *Satcher*, 244 Va. at 228, 421 S.E.2d at 826; (3) unconstitutional for trial court to use pre-sentence report that contains hearsay evidence-rejected in *Cherrix*, 257 Va. at 299, 513 S.E.2d at 647; and (4) Virginia's appellate review of death penalty cases violates the Eighth Amendment and the Due Process Clause-rejected in *Lenz*, 261 Va. at 459, 544 S.E.2d at 304. Bell has provided no compelling reason why we should depart from these precedents.

5. JURY QUESTION REGARDING EARLY RELEASE

In accordance with our decision in *Yarbrough v. Commonwealth*, 258 Va. 347, 374, 519 S.E.2d 602, 616 (1999), the circuit court instructed the jury that "[t]he words 'imprisonment for life' mean imprisonment for life without possibility of parole." During the penalty phase deliberations, the jury inquired, "Understanding that imprisonment for life means no possibility of parole, is there any other way to be released from prison?" Recognizing that geriatric release is not available to a defendant convicted of capital murder, the court's proposed answer was, "No. Not when the Defendant has been convicted of capital murder."

Bell agreed with this response, but the Commonwealth objected because there could be other ways for a defendant convicted of capital murder to be released early, such as by an act of executive pardon or clemency. To answer the question truthfully would therefore require that the jury be informed about such things, argued the Commonwealth. Concluding that the Commonwealth's position was correct, the court told the jurors that they "would have to rely on the evidence that they heard, and the instructions already presented in deciding the punishment." In the circuit court's view, a truthful answer to the jury's question would have opened the door to matters that were speculative and inappropriate for the jury to consider.

Bell argues that the circuit court erred by not answering the jury's question and instructing that other forms of early release are not available to defendants convicted of capital murder. He contends that the question indicated that the jurors were

speculating about whether, despite the instruction that life means life without parole, Bell could still receive some form of early release. He claims that this speculation, which remained unresolved, caused the jury to impose the death penalty instead of life imprisonment. Thus, Bell argues that his sentence of death was rendered in violation of Virginia law, *see Yarbrough*, 258 Va. at 373, 519 S.E.2d at 616, his rights under the Due Process Clause of the Fourteenth Amendment, *see Simmons*, 512 U.S. at 171, 114 S.Ct. 2187, and his rights to a fair and reliable sentencing determination under the Eighth Amendment, *id.* at 172–73, 114 S.Ct. 2187 (Souter, J., concurring).

However, Bell acknowledges that the court's proposed response to the jury's question was not accurate. Even though a defendant convicted of capital murder and sentenced to life imprisonment is not eligible for certain forms of early release, such as geriatric release under Code § 53.1–40.01, an act of executive pardon or clemency is still available for such a defendant. Bell, nevertheless, argues that the circuit court had a duty to fashion an appropriate response to the jury's question and suggests that such a response would have been that "a life sentence for Bell would permit no parole, no community supervision, no early release program, or any other credits that would reduce the mandatory imprisonment." Recognizing that even this answer does not address the possibility that the jury was concerned about release by an act of executive pardon or clemency, Bell suggests that the court should also have told the jury not to concern itself with anything else.

We agree that, when a principle of law is materially vital to a defendant in a criminal case, a trial court cannot merely refuse a defective instruction, but must correct the instruction and then give it in the proper form. *Whaley v. Commonwealth*, 214 Va. 353, 355–56, 200 S.E.2d 556, 558 (1973), *cited in Fishback v. Commonwealth*, 260 Va. 104, 117, 532 S.E.2d 629, 635 (2000). The issue in this case is not whether the circuit court failed to correct a defective instruction. Instead, we must decide whether the court's answer to the jury's question was, in fact, defective. Stated differently, the issue is how the jury's question in this case should have been answered "so that [the jury could be] properly informed and [could] render a fair trial to both parties while preserving ...the separation of" the judicial branch's function of assessing punishment and the executive branch's function of administering the punishment. *Fishback*, 260 Va. at 113–14, 532 S.E.2d at 633.

To address this issue and the response that Bell now puts forward as a proper answer to the jury's question, we must first examine our decision in *Fishback*. There, the question was whether a defendant convicted of a non-capital felony was entitled to have the jury instructed that parole has been abolished in Virginia for offenses committed after January 1, 1995. 260 Va. at 108, 532 S.E.2d at 630. We answered that question affirmatively. *Id.* at 115, 532 S.E.2d at 634. In addition, we also concluded that, "because Code § 53.1–40.01 is in the nature of a parole statute, where applicable juries shall also be instructed on the possibility of geriatric release pursuant to that statute." *Id.* at 115–16, 532 S.E.2d at 634.

> To clarify our new rule, we further stated that
>
> the task of the trial courts will require only that instructions with regard to the abolition of parole be tailored to the facts of a particular case. Thus, when a defendant's age and the permissible range of punishment for the offense in question totally negate the applicability of Code § 53.1–40.01, the jury will be instructed that the defendant is not eligible for parole in accordance with Code § 53.1–165.1. In those cases where geriatric release is a possibility, then the jury will be instructed in accordance with the applicable provisions of Code § 53.1–40.01 along with the instruction that parole is otherwise abolished.

Id. at 116, 532 S.E.2d at 634. Implicit in this holding is the recognition that fairness to both the defendant and the Commonwealth requires that jurors be told that, despite the abolition of parole, certain defendants still qualify for geriatric release. But when a defendant does not qualify for geriatric release, the jury need only be informed that the defendant is not eligible for parole.

In the present case, Bell's conviction of capital murder totally negated the possibility of geriatric release under Code § 53.1–40.01. Thus, pursuant to our direction in *Fishback*, the jury was instructed that Bell was not eligible for parole, i.e., that life means life without the possibility of parole. As we stated in *Fishback*, geriatric release is in the nature of parole, and thus, when a defendant does not qualify for geriatric release, an instruction that a defendant is not eligible for parole is correct, and

nothing more is required in order to have "truth in sentencing." *Id.* at 113, 532 S.E.2d at 632. Hence, the jury in this case was properly instructed with regard to the abolition of parole, and when it asked whether there is any other way to be released from prison, the court properly referred the jury to its prior instructions.

With regard to the issue of sentencing credits under Code § 53.1–202.2, we recognized in *Fishback* that a defendant's eligibility for this type of early release remains dependent upon the prisoner's conduct and participation in various programs established by the Department of Corrections, and on the executive branch's subjective assessment of that conduct and participation. *Id.* at 115, 532 S.E.2d at 634. Thus, a jury could not, without engaging in speculation, factor the possibility of sentencing credits into its determination of an appropriate sentence. *Id.* at 116, 532 S.E.2d at 634. For that reason, we held that juries are not to be instructed with regard to sentencing credits available under Code § 53.1–202.2. *Id.*

Unlike the defendant in *Fishback*, Bell's conviction of capital murder precludes the possibility of his earning sentencing credits. Thus, the reasons underlying our conclusion in *Fishback* that juries are not to be instructed about sentencing credits do not apply to Bell's situation. However, because the nature of Bell's conviction negates the applicability of Code §§ 53.1–202.2 and–202.3, just as with geriatric release, we conclude that the circuit court's instructions were correct and that, in response to the jury's question, the court again properly referred to its prior instructions.

This leaves only the question whether the jury should have been advised about the availability of early release through an act of executive pardon or clemency. Even Bell does not advocate inclusion of that information in responding to the jury's question. Instead, he argues that the circuit court should have instructed the jury that geriatric release and sentencing credits are not available to him and that the jury should not concern itself with anything else. Bell's suggested response highlights the anomaly presented by the jury's question in this case.

If the jury had inquired about a specific form of early release, such as geriatric release, then the court could have answered that question accurately and dispelled any possible speculation by the jury. Here, however, the question was general and could not have been accurately answered without telling the jury about executive clemency or pardon. Yet, we have never allowed a jury to have that information because of the potential for jury speculation resulting in a harsher sentence than would otherwise be warranted. *See Yarbrough*, 258 Va. at 372, 519 S.E.2d at 615.

So, the only response that would have comported with our precedent was to instruct the jurors that geriatric release and sentencing credits were not available to Bell and that they should not concern themselves with anything else. Yet, that kind of response would have suggested that there is some other form of early release still available to Bell and would have, in fact, invited the jury to speculate. *See Simmons*, 512 U.S. at 170, 114 S.Ct. 2187 (trial court's admonishment that jury should not consider parole and that parole was not a proper issue for the jury to consider "actually suggested that parole *was*

available but that the jury, for some unstated reason, should be blind to this fact"). Such speculation is "inconsistent with a fair trial both to the defendant and the Commonwealth." *Fishback*, 260 Va. at 115, 532 S.E.2d at 634.

Given the nature of the jury's question, we conclude that the circuit court did not err when it responded by directing the jury to rely on the evidence that it had heard and the instructions that had been given. Any other answer would either have been inaccurate or have led to further speculation by the jury. The instruction that imprisonment for life means life without the possibility of parole was correct under our holdings in *Yarbrough* and *Fishback*. Nothing more was required in this case. Thus, Bell's rights under our case law, the Due Process Clause, and the Eighth Amendment were not violated.

6. STATUTORY REVIEW

Pursuant to Code § 17.1–313(C)(1), we are required to determine whether the death sentence in this case was imposed under the influence of passion, prejudice, or other arbitrary factors. Bell asserts only that, because of the circuit court's alleged errors previously argued by him, his sentence of death was based on arbitrary factors. Our review of the record does not disclose any evidence to suggest that the imposition of the death penalty in this case was based on or influenced by any passion, prejudice, or other arbitrary factor. We also do not believe that any of the circuit court's alleged errors, which we have already separately addressed, created an atmosphere of passion or prejudice that influenced the sentencing decision.

We are also required by the provisions of Code § 17.1–313(C)(2) to determine whether Bell's sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In accordance with Code § 17.1–313(E), we have accumulated the records of capital murder cases reviewed by this Court, including not only those cases in which the death penalty was imposed, but also those cases in which the trial court or jury imposed a life sentence and the defendant petitioned this Court for an appeal. *See Whitley v. Commonwealth*, 223 Va. 66, 81, 286 S.E.2d 162, 171, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). To comply with the statutory directive that we compare this case with "similar cases," we have focused on cases in which a law enforcement officer was killed and that killing was for the purpose of interfering with the performance of official duties, and in which the death penalty was imposed based upon the future dangerousness predicate. Based on our review, we conclude that Bell's sentence of death is not excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Bell's murder of Sergeant Timbrook. While our review encompasses all capital murder cases presented to this Court for review and is not limited to selected cases, *see Burns*, 261 Va. at 345, 541 S.E.2d at 896–97, we cite the following cases as examples: *Royal v. Commonwealth*, 250 Va. 110, 458 S.E.2d 575 (1995), *cert. denied*, 516 U.S. 1097, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991); *Delong v. Commonwealth*, 234 Va. 357,

362 S.E.2d 669 (1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988); *Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984), cert. denied, 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 319 (1985).

III. CONCLUSION

For the reasons stated, we find no error in the judgment of the circuit court or in the imposition of the death penalty. We also perceive no reason to commute the sentence of death in this case. Thus, we will affirm the judgment of the circuit court.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of April, 2004.

EDWARD NATHANIEL BELL
Petitioner,

against Record No. 030539

Warden of the Sussex I
State Prison,
Respondent.

UPON A PETITION FOR A WRIT OF HABEAS CORPUS

Upon consideration of the amended petition for a writ of habeas corpus filed April 21, 2003, the respondent's motion to dismiss, and petitioner's reply to the respondent's motion to dismiss, the Court is of the opinion that the respondent's motion should be granted and the writ should not issue.

Edward Nathaniel Bell was convicted in the Circuit Court of the City of Winchester of use of a firearm in the commission of murder, possession of a firearm while in possession of cocaine, possession of cocaine with intent to distribute, and capital murder of Sergeant Ricky Lee Timbrook. On January 26, 2001, the jury fixed Bell's punishment for use of a firearm in the commission of murder at three years' imprisonment, five years' imprisonment for

possession of a firearm while in possession of cocaine, and forty years' imprisonment for possession of cocaine with intent to distribute. Based on the finding of the "future dangerousness" aggravating factor, the jury fixed Bell's punishment for capital murder at death. The trial court reduced the sentence for possession of cocaine with intent to distribute to ten years' imprisonment but sentenced Bell in accordance with the jury's verdicts for the remaining convictions. This Court unanimously affirmed the trial court's judgment and upheld the sentence of death in Bell v. Commonwealth, 264 Va. 172, 563 S.E.2d 695 (2002), cert. denied, 537 U.S. 1123 (2003).

In a portion of claim (I), petitioner alleges that he was denied due process because the prosecution failed to disclose exculpatory evidence. Petitioner contends that the prosecutor withheld evidence that would have allowed petitioner to discredit prosecution witnesses Timothy Berry and Terry Lee Johnson. Petitioner contends that Berry has recently revealed that Winchester Police Officer Richard Bush promised Berry that he would not be prosecuted for instances in which the police knew he sold crack cocaine in exchange for his testimony against Bell. Petitioner further contends that Berry now states that petitioner never threatened Timbrook. Petitioner alleges that Johnson has recently revealed that: 1) the prosecutor threatened him and made promises to him in exchange for his testimony, 2) the prosecutor and police recorded statements made by Johnson in which he denied knowing anything about the case and denied that Bell had confessed to him, and 3) Johnson's

testimony at trial that Bell had confessed to the crime was a lie.

The Court holds that this portion of claim (I) is without merit. The record, including the affidavits of police officers who interviewed Berry and Johnson, demonstrates that the police did not possess any information regarding Berry selling illegal drugs and no consideration was promised in exchange for either Berry's or Johnson's testimony. Furthermore, neither Berry nor Johnson state in their affidavits that their sworn trial testimony was a lie, and Johnson does not state that he was promised anything in exchange for his testimony. Johnson states only that after he testified at trial, he refused to swear under oath to the truth and accuracy of his trial testimony, and in response, the Commonwealth warned him that he faced a three-year mandatory minimum term of incarceration if he refused to do so. Furthermore, Berry does not state, as petitioner alleges, that petitioner never threatened Timbrook. He only states that petitioner never "directly threatened Timbrook."

In another portion of claim (I), petitioner alleges that the Commonwealth knowingly provided false testimony. Petitioner contends that the Commonwealth offered consideration in exchange for Berry and Johnson's testimony; however, the Commonwealth allowed both witnesses to testify that they had not received any promises in exchange for their testimony.

The Court holds that this portion of claim (I) is without merit. As previously stated, the record reveals that the Commonwealth did not offer Berry or Johnson consideration in exchange for their testimony. Furthermore, a claim of false testimony,

without more, does not create an issue on habeas. It must appear that "the State prosecuting officers knowingly resorted to perjured testimony to bring about petitioner's conviction." Penn v. Smyth, 188 Va. 367, 375, 49 S.E.2d 600, 603 (1948).

Also in claim (I), petitioner alleges he was denied the effective assistance of counsel at trial and on appeal because counsel failed to uncover the alleged exculpatory evidence.

The Court holds that this portion of claim (I) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984). The alleged exculpatory evidence did not exist. Thus, petitioner has failed to demonstrate how counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (II), petitioner alleges that he is mentally retarded. He alleges that because of his inferior intellectual abilities, he was given the nickname "Slow" at an early age, he was regularly given alcohol and marijuana before he was ten years old, he failed the examination for admittance into high school in Jamaica, he failed to graduate from vocational school, he held jobs that involved only simple tasks and manual labor, he never lived independently, and he has difficulty telling time, performing simple addition, or reading and writing above a basic level. Petitioner requests that his case be remanded to the circuit court, pursuant to Code § 8.01-654.2(ii), for a determination of his mental retardation.

The Court denies petitioner's request because his claim of mental retardation is "frivolous." Code § 8.01-654.2. Petitioner fails to present any evidence that he has performed at least two standard deviations below the mean on an IQ test. Thus, he has failed to demonstrate that he has significantly subaverage intellectual functioning. Code § 19.2-264.3:1.1(A)(i). Furthermore, the record demonstrates that, while petitioner's work history was varied, he was regularly employed. Although the record is not clear whether petitioner completed high school or withdrew after the tenth or eleventh grade, petitioner's own statements reveal that he maintained average grades. Petitioner lived independently and financially supported five children. He owned and drove a car, used a cell phone and pager, and read the Bible on a daily basis. Thus, petitioner fails to demonstrate that he has significant limitations in adaptive behavior. See Code § 19.2-264.3:1(A)(ii).

In another portion of claim (II) and in a portion of claim (III) (c), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to recognize or raise the issue of petitioner's mental retardation and resulting ineligibility for a death sentence at trial or on appeal, and counsel failed to develop and present evidence of petitioner's alleged mental retardation in mitigation.

The Court holds that this portion of claims (II) and (III) (c) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Petitioner is not mentally retarded. Thus, counsel was not ineffective for failing to assert a baseless argument, and petitioner has failed to demonstrate that there is a reasonable probability

that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (III), petitioner appears to allege that he was denied the effective assistance of counsel in the sentencing phase of trial because counsel, during closing argument, failed to ask the jury to sentence petitioner to life imprisonment, failed to remind the jury that a life sentence meant life without parole, failed to argue that the circumstances of the shooting were not cold-blooded, and failed to discuss petitioner's life or background.

With regard to the portion of the claim that alleges counsel were ineffective for failing to ask the jury to sentence petitioner to life and for failing to remind the jury that life imprisonment meant life without parole, the Court holds that this claim is without merit. Counsel argued in favor of a life sentence by stating that petitioner, who would be incarcerated in a maximum security prison, would not "be a threat to anybody else every [sic] again." Counsel reiterated that petitioner would spend the rest of his life in prison, and he would "not [be] getting off light"; he would truly be punished for his crimes. Counsel further argued that if any of the jurors had any "residual or lingering doubt about what they heard or about what happened that night," they should "express it" and sentence petitioner to life imprisonment. Finally, counsel argued that sentencing petitioner to death would not bring Timbrook back.

With regard to the portion of the claim that alleges counsel were ineffective for failing to argue that the circumstances of the shooting were not cold-blooded and for failing to mention aspects of petitioner's life or background, the Court holds that

this claim satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record demonstrates that petitioner insisted that he did not shoot the officer. Therefore, counsel cannot be ineffective for failing to argue that petitioner did not shoot the officer in "cold blood." Furthermore, while counsel did not point out aspects of petitioner's life and background during closing argument, evidence of his life and background was introduced during the sentencing hearing. In addition, counsel argued that the victim's family was not the only family "affected by this ... hurt by this" and the execution of petitioner would only "cause more wounds in another family." Thus, petitioner has failed to demonstrate that counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (III) (a), petitioner alleges he was denied the effective assistance of counsel at trial because counsel failed to investigate, identify or present available mitigating evidence for the penalty phase of petitioner's trial. Petitioner contends that ample evidence existed regarding his background and character that might have led the jury to conclude that petitioner was deserving of a sentence less than death. Petitioner alleges counsel should have presented evidence that Bell was the tenth of twelve surviving children of Rosalyn Bell, that his mother had ten other children by three other men at the time of petitioner's birth, and that his father had several other children by two other women. Petitioner's father was allegedly absent from home for long periods of time when he traveled to the United States to do migrant work, and his mother

was allegedly unavailable because she worked for and lived with another family. Additionally, petitioner alleges his relatives regularly gave him drugs and alcohol when he was a child, and he became a daily user of both marijuana and alcohol before the age of ten. Lastly, petitioner contends that evidence should have been presented that petitioner moved to the United States in 1992, held a variety of employment positions, and was a devoted father, financially caring for all five of his children and for relatives in Jamaica.

The Court holds that claim (III) (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record, including the affidavit of counsel, demonstrates that after interviewing petitioner, his sisters and his mother, counsel believed that there was little mitigation evidence available to assist petitioner. However, the transcript of the sentencing hearing establishes that counsel introduced evidence of petitioner's background and family life and such evidence was heard by the jury through petitioner's sister and father. Petitioner's sister testified that petitioner was one of fourteen children and that, except for one speeding incident in which she was involved after petitioner's arrest, no member of the family ever had legal problems. Petitioner's father testified that he started traveling to the United States in 1966 to do agricultural work and that, except for speeding violations; he also never had any legal troubles. While counsel did not introduce evidence of petitioner's drug and alcohol use, evidence that both petitioner's parents had multiple children with different partners, or evidence that petitioner supported five children borne of three

different women, counsel is not ineffective for failing to present evidence that could be "cross-purpose evidence" capable of aggravation and mitigation. See Barnes v. Thompson, 58 F.3d 971, 980-981 (4th Cir. 1995), cert. denied, 516 U.S. 972 (1995); Lovitt v. Warden, 266 Va. 216, 257, 585 S.E.2d 801, 825 (2003). Petitioner fails to proffer additional information that counsel should have discovered or presented during the penalty phase of petitioner's trial that would have assisted in mitigating his offense of capital murder. For example, there is not sufficient evidence in the record from a psychologist or a psychiatrist to show that petitioner's background and family life had an effect upon his development. See Lovitt, 266 Va. at 257, 585 S.E.2d at 825. Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigation evidence, the result of the proceeding would have been different. In finding no prejudice, the Court has weighed the evidence in aggravation against the mitigation evidence presented at the penalty phase of the trial and on habeas. See Wiggins v. Smith, 539 U.S. 510, ___, 123 S. Ct. 2527, 2542 (2003); Lovitt, 266 Va. at 257, 585 S.E.2d at 825-26.

In claim (III) (b), petitioner alleges he was denied the effective assistance of counsel at trial because counsel "failed to present readily available evidence to impeach the egregious and inaccurate testimony of Billie Jo Swartz." Petitioner alleges that Ms. Swartz's testimony, concerning a confrontation, between petitioner and his former and current girlfriends, was the only testimony put forth by the

Commonwealth showing petitioner's past violence; as a result, it was important for counsel to impeach her testimony. Petitioner contends that affidavits of Tracy and Joanne Nicholson, prepared after petitioner's trial, discredit Swartz's testimony. In those affidavits, the Nicholsons state, respectively, that "Eddy was never violent with me or the kids," and "Billy Jo Swartz lied during her penalty phase testimony."

The Court holds that claim (III) (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Counsel is not ineffective for failing to present evidence that could be "cross-purpose evidence" capable of aggravation and mitigation. See Barnes, 58 F.3d at 980-981. The Commonwealth could have presented other evidence, including reports to the police from Tracy Nicholson regarding abuse by petitioner, which would have discredited the testimony of both proposed witnesses. Thus, petitioner has failed to demonstrate how counsel was ineffective for failing to present the proposed impeachment evidence, and he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (III) (c), petitioner alleges he was denied the effective assistance of counsel at trial because counsel failed to advise petitioner of his right to testify during the penalty phase of his trial. Petitioner contends that he wanted to testify but did not understand the procedures of a death penalty trial. If petitioner had testified, he claims that he would have told the jury about his relationship with

his children and the rest of his family and the sympathy he felt toward the victim's family.

The Court holds that this portion of claim (III) (c) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Although one of his attorneys states he did not advise petitioner of his right to testify during the sentencing phase and the attorney responsible for preparing for and presenting petitioner's case at sentencing does not specifically recall whether he informed petitioner of this right, the record, including the affidavits of petitioner's trial attorneys, demonstrates that petitioner was aware of his right to testify at trial. One of his attorneys stated in his affidavit that he told petitioner, before trial, that he could testify. Petitioner was also present while his attorneys questioned the prospective jurors about petitioner's right to testify and when his attorneys argued to the trial court that petitioner may have to testify during the sentencing phase. Thus, petitioner was aware of his right to testify during the entire trial, and he waived that right. See Daniels v. Lee, 316 F.3d 477, 490-92 (4th Cir. 2003). Petitioner has failed to demonstrate that counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (IV), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to object to the verdict forms on grounds that they did not comport with the trial court's instructions, Virginia law, or federal constitutional requirements. Relying on Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999), and Lenz v. Warden, 265 Va. 373, 579 S.E.2d 194

(2003), vacated and rev'd, Record No. 012883 (March 5, 2004), petitioner contends that the verdict forms were incomplete because they failed to provide the jury with the option of sentencing petitioner to life imprisonment upon a finding that future dangerousness had not been proven beyond a reasonable doubt.

The Court holds that claim (IV) is without merit. During the sentencing phase of petitioner's trial, the jury was presented with three verdict forms. The first verdict form allowed the jury to sentence petitioner to death after determining that petitioner posed a future danger to society. The second verdict form allowed the jury to sentence petitioner to life imprisonment or life imprisonment with a fine after finding that petitioner posed a future danger to society. The final verdict form, which comports with Code § 19.2-264(D), provided:

> We, the jury, on the issue joined, having found the defendant guilty of [capital murder] and having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at ___ imprisonment for life ...

Contrary to petitioner's assertion, the jury in Atkins was not given the above statutory verdict form. Instead, it was the trial court's failure to submit the statutory verdict form to the jury in Atkins that constituted reversible error. Atkins, 257 Va. at 178-79. Thus, the issue present in Atkins does not exist in this case because petitioner's jury received the statutory verdict form that was absent in Atkins.

In Powell v. Commonwealth, 261 Va. 512, 545, 552 S.E.2d 344, 363 (2001), which was decided after petitioner's capital murder trial concluded, the Court held that a trial court must give the jury a verdict form providing expressly for the imposition of a life sentence and a fine of not more than $100,000 if the jury finds that the Commonwealth has established one or both aggravating factors. The verdict forms that were provided to the jury in petitioner's case expressly provided the option missing in Powell.

In a portion of claim (V) (a), petitioner alleges his right to a trial by jury was violated because the jurors failed to honestly respond during *voir dire*. Petitioner relies on an affidavit of Larry J. Miles, an alternate juror, which states, "[f]ollowing the first or second day of trial, there were two older ladies on the jury who talked about knowing the family of the victim, Timbrook, by their names. These same two jurors spoke of going to church with Timbrook's family, and going on picnics with Timbrook's family." Alternate Juror Miles does not recall the names of the two women. Petitioner submits that trial counsel learned of Miles' allegation some point after the conclusion of petitioner's trial.

The Court holds that this portion of claim (V) (a) is without merit. The record demonstrates that jury selection consumed the first day and approximately half of the second day of trial. The affidavit of Alternate Juror Miles states that he overheard two jurors talking about their relationship with the victim's family "following the first or second day of trial." Petitioner fails to allege whether the two women Alternate Juror Miles allegedly overheard were actually seated on the jury or whether they were excused. Furthermore, the record

demonstrates that the trial court asked the entire venire whether any juror was related to the victim, knew the victim, or was a friend of any member of the victim's family. No jurors were related to the victim, and those that knew the victim or who were friends with his family were identified, questioned by the trial court and defense counsel, and were excused. A juror who was acquainted with a member of the victim's family was questioned about the relationship and determined qualified to sit on the jury. The record, therefore, demonstrates that any juror who had a disqualifying connection to the victim or his family was not empanelled.

In claim (V) (a), petitioner also alleges he was denied the effective assistance of counsel because counsel failed to conduct an adequate voir dire, thereby failing to ascertain juror bias.

The Court holds that this portion of claim (V) (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record demonstrates that both the trial court and counsel conducted a thorough *voir dire*, and any juror who had a disqualifying connection to the victim or his family was excused. Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (V) (b), petitioner alleges that the "trial court...failed to ensure that jurors were adequately instructed to refrain from deliberating on the case before the entire case was submitted to the jury." Petitioner contends that the

jurors discussed the case and compared notes with each other prior to deliberation.

The Court holds that this portion of claim (V) (b) is procedurally defaulted because this non-jurisdictional issue was addressed by the trial court, and any alleged error could have been raised on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974).

In another portion of claim (V) (b), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to ensure that jurors were adequately instructed to refrain from deliberating before the entire case was submitted to the jury.

The Court holds that this portion of claim (V) (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record demonstrates that the trial court, prior to the presentation of any evidence, instructed the jury as follows:

> You should discuss the case only with your fellow jurors. And, then only in the jury room when all of the members of the jury are present together. You should keep an open mind and you should not decide any issue in the case until you have heard all of the evidence and receive further instructions from the Court.

Furthermore, after the third day of trial, the court cautioned the jury not to compare notes or to deliberate until all the evidence was received. There is no indication that the jury failed to follow the

court's instructions and nothing to rebut the presumption that the jury did follow the instructions. See Emmett v. Commonwealth, 264 Va. 364, 371, 569 S.E.2d 39, 44 (2002), cert. denied, 123 S. Ct. 1586 (2003) (holding that a jury is presumed to follow the instructions of the court.) Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (V) (c), petitioner alleges the trial court failed to act when jurors slept through "significant" portions of the trial. Petitioner contends that the prosecutor, defense counsel and the court clerk informed the trial court that jurors were falling asleep during the trial, but the trial judge took no action, acknowledging only that he could not see the jurors from where he was seated.

The Court holds that this portion of claim (V) (c) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

Also in claim (V) (c), petitioner alleges he was denied the effective assistance of counsel because counsel failed to object to the sleeping jurors, failed to ask for replacement jurors, failed to move for a new trial and failed to raise the issue on appeal.

The Court holds that this portion of claim on (V) (c) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record demonstrates that after the

first report that jurors were sleeping, the trial judge stated he would watch for sleeping jurors and turn down the temperature of the courtroom. After subsequent reports, the trial judge stated he had been watching the jury and did not notice that any jurors had fallen asleep. The question whether jurors were sufficiently awake to continue with the trial is a matter left to the trial judge's sole discretion. Ellis v. Commonwealth, 227 Va. 419, 422, 317 S.E.2d 479, 481 (1984). Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (V) (d), petitioner alleges that "jurors were prevented from providing fundamental fact-finding and credibility determinations." Petitioner contends that the trial court committed error by reopening the case, recalling witness Terry Johnson and allowing him to be sworn for the first time out of the presence of the jury and after he had already testified. Petitioner also alleges that the trial court erred by not securing a waiver from petitioner because trial counsel had previously represented Johnson.

The Court holds that this portion of claim (V) (d) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

Also in claim (V) (d), petitioner alleges he was denied the effective assistance of counsel because counsel failed to call Greg Roberts to rebut Johnson's claim that petitioner had confessed to the crime.

The Court holds that this portion of claim (V) (d) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record, including the affidavit of counsel, demonstrates that counsel attempted to contact Roberts pursuant to information provided by petitioner, but counsel was unable to do so. Thus, petitioner has failed to demonstrate how counsel was ineffective for failing to call the witness, and he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (V) (e), petitioner alleges that an alternate juror participated in deliberations, resulting in a total of thirteen jurors instead of twelve.

The Court holds that this portion of claim (V) (e) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

In another portion of claim (V) (e), petitioner alleges he was denied the effective assistance of counsel because counsel failed to object to the presence of an alleged extra juror during deliberations.

The Court holds that this portion of claim (V) (e) is without merit. The record, including the trial transcript and the affidavit of the court reporter, demonstrates that the trial court discharged the three alternate jurors before deliberations commenced. The affidavit of the court reporter demonstrates that she erroneously included one of

the alternate juror's names in the transcript when the twelve jurors were polled. However, the transcript of the sentencing phase deliberations and polling do not contain the error. Additionally, the trial court and counsel did not mention any irregularity in the number of jurors.

In the final portion of claim (V) (e), petitioner alleges that he was denied the effective assistance of counsel on appeal because counsel failed to raise the issue of the alleged presence of an extra juror.

The Court holds that this remaining portion of claim (V) (e) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. As previously stated, the record demonstrates that there were only twelve jurors present during deliberations. Counsel cannot be ineffective for failing to raise a claim that has no merit. Furthermore, petitioner has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (VI), petitioner alleges his rights of due process and confrontation were violated by his exclusion during significant portions of his trial. Petitioner alleges that the trial court conducted several hearings in chambers without the presence of petitioner and without making the conferences part of the record.

The Court holds that this portion of claim (VI) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

Also in claim (VI), petitioner alleges he was denied the effective assistance of counsel because counsel failed to object when the court conducted hearings on legally and factually substantive matters outside of petitioner's presence and because counsel failed to ensure that all conferences were memorialized on the record.

The Court holds that this portion of claim (VI) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The trial court stated on the record, in the presence of petitioner, that the conferences occurred. In some instances, the trial court summarized on the record, in the presence of petitioner, the substance of the conferences and in-chamber discussions during which petitioner was not present. There is no indication that petitioner was not informed of these discussions or that he objected to their taking place without him. Thus, petitioner has failed to demonstrate that counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (VII), petitioner alleges the trial court erred by placing him in shackles during the trial without any finding of need. Petitioner contends that even though trial counsel objected to the shackles, the trial court did not make a finding of necessity and "abdicated its duty in this regard."

The Court holds that this portion of claim (VII) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

In claim (VII), petitioner also alleges he was denied the effective assistance of counsel because counsel unreasonably failed to object on the record about the use of shackles, failed to preserve for the record the in-chamber discussions, objections, and rulings regarding the shackles, and failed to raise the substantive issue on appeal.

The Court holds that this portion of claim (VII) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record, including the affidavit of counsel, demonstrates that counsel objected to the shackles during a discussion with the trial judge in chambers. Even though counsel did not put the objection on the record, a trial judge exercises discretion to determine whether to put a defendant in restraints and the determination need not be made in a formal hearing or upon evidence offered or admitted. Stockton v. Commonwealth, 241 Va. 192, 199, 402 S.E.2d 196, 200 (1991), cert. denied, 502 U.S. 902 (1991). Additionally, during jury selection, the trial judge ordered the petitioner's leg restraints changed from shackles to leg weights, which were worn under petitioner's pants and could not be seen by the jury. Thus, petitioner has failed to demonstrate that counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (viii), petitioner alleges that "the indictment failed to state a death eligible capital offense by not including specific aggravating factors." Petitioner argues that because the indictment only charged him with a violation of Code § 18.2-31(6) and not also with a violation of Code

§ 19.2-264.2, he was charged solely with capital murder, and not death-eligible capital murder. As a result, his death sentence must be set aside.

The Court holds that this portion of claim (VIII) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

Also in claim (VIII), petitioner alleges he was denied the effective assistance of counsel because counsel failed to argue at trial or on appeal that the indictment failed to state a death- eligible capital offense.

The Court holds that this portion of claim (VIII) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. There is no constitutional requirement that a capital murder indictment include allegations concerning aggravating factors. Ring v. Arizona, 536 U.S. 584, 597 n. 4 (2002) (holding that the Fourteenth Amendment has not been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury."); Apprendi v. New Jersey, 530 U.S. 466, 477 n. 3 (2000). Furthermore, this Court has held that a defendant charged with capital murder is not entitled to a bill of particulars delineating the Commonwealth's intended aggravating factors when the indictment specifying the crime gives the defendant notice of the nature and character of the offense. Roach v. Commonwealth, 251 Va. 324, 340, 468 S.E.2d 98, 107 (1996). The indictment in this case gave petitioner notice of the nature and character of the offense. Thus, counsel cannot be held ineffective for

failing to make a frivolous argument. Furthermore, petitioner has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (IX), petitioner alleges that the aggravating factor of "future dangerousness" is unconstitutional because it is vague and the statutory scheme does not require that it be proven beyond a reasonable doubt. Petitioner further contends that the verdict form failed to include a statement requiring the jury to find the aggravating factor of "future dangerousness" beyond a reasonable doubt. Petitioner further alleges the phrase "beyond a reasonable doubt" used in the jury instruction was rendered meaningless because of the qualifying word "probability." Petitioner argues that because of the defective verdict form and jury instruction and because unadjudicated conduct was presented to the jury without the requirement that the jury find such conduct beyond a reasonable doubt, petitioner's Eighth Amendment rights and Fourteenth Amendment Due Process rights were violated.

The Court holds that the portion of claim (IX) that alleges that the aggravating factor of "future dangerousness" is unconstitutionally vague is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction. Bell, 264 Va. at 203, 563 S.E.2d at 716. Therefore, it cannot be raised in a petition for a writ of habeas corpus. Henry v. Warden, 265 Va. 246, 249, 576 S.E.2d 495, 496 (2003). The remainder of this portion of claim (IX) is procedurally defaulted because these non-jurisdictional issues could have been raised at trial or on direct appeal but were not,

and thus, they are not cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d. at 882.

In claim (IX), petitioner also alleges he was denied the effective assistance of counsel because counsel failed to raise the issue of the unconstitutionality of the aggravating factor, "future dangerousness," at trial or on appeal.

The Court holds that this portion of claim (IX) is, in part, without merit. Counsel argued at trial and on appeal that the "future dangerousness" predicate is unreliable and vague, and this Court rejected that claim. Bell, 264 Va. at 203, 563 S.E.2d at 716. The Court holds that the remainder of this portion of claim (IX) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Petitioner admitted in his petition for habeas corpus relief that "[t]he issue whether the 'future dangerousness' aggravating factor is unconstitutional in light of a 'beyond a reasonable doubt' standard, has not been addressed by any court." Thus, counsel is not ineffective for failing to raise novel claims not supported by existing law. See Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995), cert. denied, 517 U.S. 1171 (1996). Furthermore, this Court has rejected claims that the use of unadjudicated conduct to prove future dangerousness is unconstitutional. Cherrix v. Commonwealth, 257 Va. 292, 299, 513 S.E.2d 642, 647 (1999), cert. denied, 528 U.S. 873 (1999); Goins v. Commonwealth, 251 Va. 442, 453, 470 S.E.2d 114, 122 (1996), cert. denied, 519 U.S. 887 (1996). Thus, petitioner has failed to demonstrate how counsel's performance was deficient, and he has failed to demonstrate that there is a reasonable probability

that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (X), petitioner alleges his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated because the jury was selected in a discriminatory manner and did not represent a fair cross-section of the community. Petitioner contends that out of the 100 persons in the venire and the 55 persons called forth in selecting his jury, only two were African-American. African-Americans comprised only 3.6% of the jury while the population of the City of Winchester is 10.5% African-American.

The Court holds that this portion of claim (X) is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction. Bell, 264 Va. at 197, 563 S.E.2d at 712. Therefore, it cannot be raised in a petition for a writ of habeas corpus. Henry, 265 Va. at 249, 576 S.E.2d at 496.

Also, in claim (X), petitioner alleges he was denied the effective assistance of counsel because counsel did not sufficiently preserve or raise the issue of discrimination in the jury selection process at trial or on appeal.

The Court holds that this portion of claim (X) is without merit. The record demonstrates that counsel preserved and raised the claim at trial and on direct appeal, and the Court rejected it. Bell, 264 Va. at 197, 563 S.E.2d at 712.

In a portion of claim (XI), petitioner alleges that the death penalty in Virginia is unconstitutional because it is allegedly applied in a random and arbitrary manner. The Court holds that this portion of claim (XI) is without merit. The constitutionality

of the death penalty has been upheld repeatedly by this Court. Lovitt v. Commonwealth, 260 Va. 497, 508, 537 S.E.2d 866, 873-74 (2000), cert. denied, 534 U.S. 815 (2001).

Also in claim (XI), petitioner alleges he was denied the effective assistance of counsel because counsel failed to raise arguments from new published studies in support of the claim that the death penalty as applied in Virginia is unconstitutional.

The Court holds that this portion of claim (XI) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Statistical conclusions, like those cited by petitioner, have been rejected by the United States Supreme Court because they demonstrate nothing unconstitutional about a petitioner's own sentence. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987). Thus, petitioner has failed to demonstrate how counsel was ineffective for failing to raise such arguments, and he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (XII), petitioner alleges that the trial venue should have been changed as a result of the pretrial publicity. Petitioner contends that the extensive media coverage prevented him from receiving a fair trial and a fair and impartial jury.

The Court holds that this portion of claim (XII) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial or on direct appeal but was not, and thus, it is not

cognizable in a petition for a writ of habeas corpus. Parrigan, 215 Va. at 29, 205 S.E.2d at 682.

Also in claim (XII), petitioner alleges he was denied the effective assistance of counsel because counsel failed to pursue a motion for change of venue, failed to gather news accounts to substantiate the motion, and failed to object to the seating of a biased jury.

The Court holds that this portion of claim (XII) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record demonstrates that counsel filed a motion to change venue but asked the court to defer ruling on it until the court attempted to seat the jury. The court excluded potential jurors that were biased by media influence, and the jury was selected with relative ease. See Thomas v. Commonwealth, 263 Va, 216, 232, 559 S.E.2d 652, 661 (2002)(holding that the ease of seating the jury is a relevant factor in determining whether a motion for a change of venue should be granted). Thus, petitioner has failed to demonstrate that counsel was ineffective for failing to pursue the motion for change of venue, and he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (XIII), petitioner alleges error because he did not receive consular notification as required by the Vienna Convention.

The Court holds that this portion of claim (XIII) is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction. Bell, 264 Va. at 185-89, 563

S.E.2d at 705-07. Therefore, it cannot be raised in a petition for a writ of habeas corpus. Henry, 265 Va. at 249, 576 S.E.2d at 496.

In claim (XIII), petitioner also alleges that he was denied the effective assistance of counsel because counsel failed to communicate and seek assistance from the Jamaican consulate, and counsel failed to argue at trial and on direct appeal that petitioner's rights under the Vienna Convention were violated.

The Court holds that this portion of claim (XIII) is without merit. The record demonstrates that counsel preserved and raised the claim at trial and on direct appeal, and the Court rejected it. Bell, 264 Va. at 185, 563 S.E.2d at 705-06.

In the final portion of claim (XIII), petitioner alleges that counsel was ineffective for failing to seek assistance from the Jamaican consulate.

The Court holds that this remaining portion of claim (XIII) fails to satisfy the "prejudice" prong of the two-part test enunciated in Strickland. Petitioner has failed to demonstrate how the Jamaican consulate would have been helpful to his defense. Thus, he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (XIV) (a), petitioner alleges he was denied the effective assistance of counsel pursuant to each of his first thirteen claims. The Court denies each of these claims on grounds previously addressed.

In claim (XIV) (b), petitioner alleges he was denied the effective assistance of counsel because counsel failed to call witnesses noted in claims III

and V, and "Captain Sobonya." Petitioner contends that "Captain Sobonya" would "further cast doubt on the origin of the gun." The issues of ineffective assistance of counsel in claims III and V have been addressed above. The Court holds that the remaining portion of the claim is without merit. Petitioner has no claim regarding "the origin of the gun" and provides no argument in support thereof.

In claim (XIV) (c), petitioner claims he was denied the effective assistance of counsel because counsel failed to make a motion to strike challenging the sufficiency of the evidence with regard to the issue of premeditation and failed to present argument on that issue. Petitioner further alleges that counsel was ineffective for failing to raise the issue on appeal. Petitioner argues that several factors negate premeditation, including that petitioner did not recognize the identity of the person chasing him, he shot the victim once after a full-speed chase, and petitioner used marijuana and was mentally retarded. Additionally, petitioner alleges that counsel was ineffective for failing to object to the irrelevant evidence regarding the "enmity between Sgt. Timbrook and Mr. Bell."

The Court holds that claim (XIV) (c) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record demonstrates that petitioner insisted that he did not shoot the officer. Therefore, counsel could not have argued to the jury that petitioner shot the victim without premeditation. Additionally, counsel moved to strike the evidence on other grounds. Moreover, eyewitness testimony established that the killer deliberately stopped, turned, aimed and fired at a chasing officer whose gun was not drawn. The

intent to kill need not exist for any specific period of time before the killing; intent to kill only has to exist for a moment before the killing. Schmitt v. Commonwealth, 262 Va. 127, 143, 547 S.E.2d 186, 197 (2001), cert. denied, 534 U.S. 1094 (2002). Also, evidence about the "enmity between" the victim and petitioner was relevant to the issue of premeditation. Thus, petitioner has failed to demonstrate that counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (XIV) (d), petitioner alleges he was denied the effective assistance of counsel because counsel failed to protect petitioner from the prosecutor's "improper and prejudicial remarks." Petitioner argues that the prosecutor misstated the evidence by telling the jury that petitioner, while singing a rap song, said "Boom, boom, boom, Timbrook." Petitioner also argues that when the prosecutor asked witnesses Billie Jo Swartz and Terry Lee Johnson "[w]ere you told to tell the truth[?]" he "extracted special assurances from the witnesses" that they had told the truth. Additionally, petitioner contends that the prosecutor impermissibly placed the evidentiary burden on petitioner when he stated during closing argument, regarding the defense theory that someone else shot the officer, "there has to be evidence...there has to be evidence," and when he stated that "it is my duty ... as a member of the bar," to acknowledge mitigating evidence.

The Court holds that claim (XIV) (d) is without merit. The record demonstrates that Jason Plummer testified that he was riding in a car with

petitioner, listening to a rap song. When the sound of gunfire played on the song, petitioner said Timbrook's name. Secondly, it is not improper to remind a witness that he/she has been sworn to tell the truth. Petitioner's assertion that the prosecutor improperly shifted the burden when he stated, "there has to be evidence" is not an objectionable argument. See Johnson v. Commonwealth, 236 Va. 48, 51, 372 S.E.2d 134, 136 (1988). Lastly, the record demonstrates that the trial court made it clear to the jury that counsel's closing argument was not evidence.

The Court denies petitioner's request for expert assistance and petitioner's "supplement to claims I and XIV in petition for writ of habeas corpus."

Accordingly, the writ of habeas corpus shall not issue and the said petition is dismissed.

A Copy,
Teste:
Patricia H. Krueger, Clerk
By:
/s/
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF WINCHESTER

COMMONWEALTH OF VIRGINIA

v. 99-CR-478

EDWARD NATHANIEL BELL,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Edward Nathaniel Bell be carried out on the 8th day of April, 2008, at such a time of day as the director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 8, 2008, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Gene M. Johnson, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261;

The Honorable Alexander R. Iden
Commonwealth's Attorney
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Winchester, Virginia 22601;

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Katherine P. Baldwin
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court hereby dispenses with endorsements by counsel.

[Handwritten:] The Court noted the objection of Counsel for Edward Nathaniel Bell.

Entered on February 14, 2008.

/s/ Dennis Lee Hupp
Judge

A COPY TESTE:
/s/ Teresa M. Barnhart
~~Clerk~~ Deputy Clerk
Winchester Circuit Court

OPPOSITION BRIEF

90

(2)

No. 07A798
No. 07-1223

FILED
MAR 28 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit And Application For Stay Of Execution

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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6/16/08 75P

QUESTIONS PRESENTED

1. Should certiorari be granted to decide whether deference under 28 U.S.C. § 2254(d) should be given to the state court's judgment after the federal habeas court has held an evidentiary hearing, in a case where the hearing developed no evidence which had not already been considered in fact or kind by the state court?

2. Should certiorari be granted to decide whether a federal court of appeals may categorically reject "double-edged" evidence as a basis for a claim of ineffective assistance in sentencing investigation, in a case where the court below did not categorically reject such evidence but rather determined that the state court reasonably found no prejudice based on a weighing of the totality of the evidence presented in aggravation and mitigation?

3. Should certiorari be granted on a lethal injection claim in this habeas corpus case upon which a certificate of appealability was denied, no decision was made in the court below and which was decided by the state court on independent state law grounds which avoided the constitutional issue?

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FRAP 28 27

STATEMENT OF THE CASE

I. Proceedings

On January 25, 2001, a jury in the Circuit Court of Winchester, Virginia, found Edward Bell guilty of the capital murder of Winchester City Police Officer Richard Timbrook. *See* Va. Code § 18.2-31(6). It also found him guilty of the use of a firearm in the commission of murder, possession of a firearm while in possession of cocaine and possession of cocaine with the intent to distribute. The jury sentenced Bell to death for the capital murder, finding that Bell would continue to be a serious danger, Virginia Code § 19.2-264.4, and to prison terms for the other crimes. On June 7, 2002, the Virginia Supreme Court unanimously affirmed, *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002), and on January 13, 2003, this Court denied Bell's petition for a writ of certiorari. *Bell v. Virginia*, 537 U.S. 1123 (2003). On April 29, 2004, the Virginia Supreme Court denied Bell's habeas corpus petition (Pet. App. 231a) and on December 2, 2004, the Winchester Circuit Court set Bell's execution date for January 7, 2005. On April 18, 2005, this Court again denied certiorari review. *Bell v. True*, 544 U.S. 985 (2005).

On December 23, 2004, the United States District Court for the Western District of Virginia stayed Bell's execution. In a subsequent order, the district court granted Bell until May 17, 2005, to file his federal habeas corpus petition. *Bell v. True*, 366

F. Supp. 2d 403 (W.D.Va. 2005).[1] On February 7, 2006, the district court dismissed most claims and ordered an evidentiary hearing on Bell's Claim IV(A) that his trial counsel were ineffective in their investigation and presentation of mitigating evidence in the sentencing phase of his capital murder trial. *Bell v. True*, 413 F.Supp.2d 657, 696-97 (W.D.Va. 2006). At the conclusion of the hearing, District Judge James P. Jones found that Bell was not entitled to relief. (JA 2023).[2] On September 18, 2006, the district court granted a certificate of appealability (COA) on Bell's claim IV(A). (JA 2051). On October 12, 2006, the district court denied Bell's motion to expand the COA. (JA 2052).

On February 7, 2007, the Fourth Circuit also denied a motion to expand the COA. After briefing and argument on the COA issue, the Fourth Circuit issued its unpublished decision denying relief on January 4, 2008. *Bell v. Kelly*, No. 06-22, 2008 U.S. App. LEXIS 125 (4th Cir. 2008). On January 29,

---

[1] On May 12, 2005, Bell filed in the Fourth Circuit Court of Appeals a petition for a writ of mandamus and emergency motion for a stay, asking for an order directing the district court to vacate its order requiring Bell to file his § 2254 petition by May, 2005. The Fourth Circuit denied that petition on May 16, 2005. *In re: Bell*, No. 05-9 (4th Cir. May 16, 2005).

[2] In this brief, the Warden will refer to the Joint Appendix filed below in the Fourth Circuit as, "JA ___." The Warden has provided the Court with a copy of the Joint Appendix. The Warden will refer to the appendix filed with this brief as, ("Resp. App. ___.").

2008, the Fourth Circuit denied Bell's petition for rehearing with no judge of the court requesting a poll on Bell's petition for rehearing *en banc*.

On February 14, 2008, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Winchester, Virginia scheduled Bell's execution for April 8, 2008. On March 17, 2008, the Fourth Circuit denied Bell's motion for a stay of execution. Bell filed a petition for a writ of certiorari in this Court on March 25, 2008.

II. The crimes

On direct appeal, the Supreme Court of Virginia found the facts regarding Bell's crimes. On the night of October 29, 1999, Officer Timbrook, working with probation officers in a community program, came across two men in a high-crime area. One began to run. Officer Timbrook followed on foot, yelling, "stop, police." Officer Timbrook never unholstered his service gun. The chase continued through back streets and ended in an alley when the man being pursued stopped, turned around, shot the officer in his head, killing him, and then fled the scene. A massive search of the area that night was unsuccessful. The next morning, Bell was found hiding in a coal bin in the basement of a house near to the shooting. He had broken in through a basement window. He had gunshot residue still on his hands. His gun was found outside the basement window. It was the murder weapon and contained a DNA profile from which Bell could not be excluded.

Bell was a Jamaican national, living in Winchester. He was a drug dealer who had been convicted of carrying a concealed weapon. Officer Timbrook had made that arrest. Bell felt harassed by Timbrook and boasted to acquaintances that someone should kill him. Bell was fighting deportation when he murdered Officer Timbrook and knew on that night that if he was caught with a gun and cocaine, he would be deported. Bell had a history of run-ins with the authorities as well as a history of domestic abuse with a girlfriend. *Bell*, 563 S.E.2d at 700-703, 718.

III. The lethal injection claim

Contrary to Bell's assertion at page 33 of his petition in this Court, the Virginia Supreme Court did *not* address a lethal injection claim in its habeas corpus review *because Bell did not present such a claim*.

He did present a lethal injection issue *on direct appeal* in the Virginia Supreme Court, but the issue was a state-law matter of whether the trial court improperly had denied him an evidentiary hearing on the claim. (Resp. App. 4-5). The Virginia Supreme Court expressly *declined* to address the constitutionality of lethal injection because "it would be an unnecessary adjudication of a constitutional issue to decide whether lethal injection violates the Eighth Amendment" in Virginia where capital murderers always may choose another method that

has been upheld as constitutional. *Bell*, 563 S.E.2d at 715.

When Bell raised the claim in his federal habeas petition, the district court found the state court's decision not unreasonable under 28 U.S.C. § 2254(d). *Bell*, 413 F.Supp.2d at 736-37. Bell filed a perfunctory request in the district court for a certificate of appealability (COA) on the claim. (Resp. App. 14). The district court denied the request. (Resp. App. 16). Bell's similar request in the Fourth Circuit for a COA also was denied. (Resp. App. 20-23).

IV. The ineffective assistance of counsel claim

A. Trial counsel's investigation and strategy

Before trial, Bell's two defense attorneys obtained the appointment of Dr. Stejskal, Ph.D., a well-respected licensed clinical psychologist with the University of Virginia's Institute of Law, Psychiatry and Public Policy. Dr. Stejskal conducted hours of interviews with Bell, a battery of standardized tests and interviews with Bell's family and with the Captain of security at the jail. Dr. Stejskal reviewed extensive records relating to the crime and Bell. However, as he explained:

> Jamaican school, military and criminal records were pursued through the offices of the Ambassador of Jamaica in Washington, D.C. . . . . [T]he Embassy of Jamaica indicated that their staff had no success in

> retrieving any Jamaican institutional records. Family members in Jamaica were also unsuccessful in obtaining any of this information.

(JA 1718). Bell's trial counsel independently attempted to obtain records pertaining to Bell from the Jamaican Embassy but were unsuccessful (JA 1827-28). Bell's federal habeas counsel also presented no background records to the district court. Indeed, Bell never has presented any records pertaining to his background to any court, state or federal.

Dr. Stejskal found "no signs or symptoms of a severe mental illness" (JA at 1719) or brain damage. A test for malingering was administered and the results showed Bell was malingering and thus called into question the results of all the tests. (JA at 1720-21). Dr. Stejskal ruled out Virginia's statutory mitigating factors of being unable to appreciate the criminality of his conduct or conform his conduct to the law. He noted that there was early and persistent drug use but no known traumas, neglect or abuse. (JA at 1722). He found that Bell came from a large, happy, strongly Christian, Jamaican family, most of whom emigrated to this Country and became hard-working citizens. Bell was the only son and a spoiled "Mama's boy."

Bell fathered a child in Jamaica by Barbara Williams and, after emigrating to the States, returned to Jamaica to marry her. Bell maintained employment while he was in Jamaica but when he moved here he fell in with "wrong friends" and

started seeing women even though his wife and child were in Jamaica. He eventually had four more children here by two different women and later was divorced from his wife in Jamaica. Bell had domestic violence incidents with his girlfriends involving the police, and at least one such incident involved Officer Timbrook. Bell provided no child support but did buy the children gifts. No one in the family except Bell ever was in trouble with the law. (JA at 1722-27). Dr. Stejskal advised counsel not to use him as a witness because aggravating factors might come in during his cross-examination and, if he were called to testify, that would trigger the Commonwealth's right to its own expert who would recharacterize Bell's history as aggravating. (JA at 1727). To this day, Bell disputes none of Dr. Stejskal's findings.

Before trial, counsel sought a change of venue. Counsel knew that the Winchester jury pool would be familiar with the rampant drug dealing associated with the Charlestown Racetrack area; indeed, "going to the racetrack" was code for dealing. (JA 1831-32, 1849). Counsel knew the evidence would show that Bell was returning from the racetrack the night he murdered Officer Timbrook. (JA 1890). Counsel also knew that, in the Winchester area, people assumed that unemployed Jamaican natives who frequented the racetrack were drug dealers. (JA 1831-32, 1849). Counsel believed that, while a Winchester jury might fairly decide guilt or innocence, if guilt were found, Bell would be a "dead man walking." (JA 1893). The trial court denied the motion for a change of venue.

Counsel identified Bell's sister Nellie in Jamaica as a very good family witness whom they wanted to testify about Bell's life, but she unexpectedly died shortly before trial. (JA 1352, 1836). Counsel also planned to present witnesses about prison conditions in a maximum security prison to argue that Bell would not be a danger if given a life sentence because they had seen that strategy work in other capital trials. The trial court denied that evidence. (JA 1962).

Trial counsel used Joann Nicholson, Bell's girlfriend's mother, to find witnesses but she did not want to testify because she would be excluded from the trial. (JA 1935-36). They knew of Bell's ex-wife in Jamaica, her child and Bell's other girlfriends and children in the United States, but considered such evidence to be fraught with difficulties. Counsel Fischel believed Bell's lack of financial support for these children would have been seen as aggravating by a Winchester jury, especially given the fact that Bell was a drug dealer who gunned down an officer. (JA 1835). He also believed that it would insult the jury to present a case at sentencing asking for sympathy after so zealously contesting and denying guilt in the guilt phase, in a case where there were no strongly mitigating circumstances explaining his conduct in the killing; he believed such a strategy to be inconsistent. (JA 1829, 1835). Counsel Williams believed the picture of a man who left his wife, took up with other women and had multiple children by multiple women would be aggravating in a case where the slain officer never was permitted even to

see his only child. (JA 1937). *The fact that Bell had various children with various women and abandoned his wife never was known by the jury.*

Trial counsel consulted with experts at Washington and Lee University who agreed with counsel's decisions regarding what evidence to present, and not present, at sentencing. (JA 1838-40). At sentencing, they presented Bell's sister and father. His sister informed the jury that Bell was one of 14 children and that the family was from Jamaica. (JA 249). His father testified that he started coming to this Country in 1966 to work on farms and that he was a construction worker in Jamaica. (JA 252). Both family members testified that Bell's family, including all the siblings, never had been in trouble with the law. (JA 250, 253). Counsel presented no additional evidence. In closing argument, counsel argued for life because Bell was not a danger in prison, a life sentence was severe punishment, any residual doubt should not result in a death sentence and his death would not bring back Officer Timbrook. (JA 267-74).

B. The Virginia Supreme Court's habeas decision

The Virginia Supreme Court dismissed Bell's sentencing ineffective assistance claim as follows:

> In claim (III) (a), petitioner alleges he was denied the effective assistance of counsel at trial because counsel failed to investigate, identify or present available mitigating

evidence for the penalty phase of petitioner's trial. Petitioner contends that ample evidence existed regarding his background and character that might have led the jury to conclude that petitioner was deserving of a sentence less than death. Petitioner alleges counsel should have presented evidence that Bell was the tenth of twelve surviving children of Rosalyn Bell, that his mother had ten other children by three other men at the time of petitioner's birth, and that his father had several other children by two other women. Petitioner's father was allegedly absent from home for long periods of time when he traveled to the United States to do migrant work, and his mother was allegedly unavailable because she worked for and lived with another family. Additionally, petitioner alleges his relatives regularly gave him drugs and alcohol when he was a child, and he became a daily user of both marijuana and alcohol before the age of ten. Lastly, petitioner contends that evidence should have been presented that petitioner moved to the United States in 1992, held a variety of employment Positions, and was a devoted father, financially caring for all five of his children and for relatives in Jamaica.

The Court holds that claim (III) (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record; including the affidavit of counsel, demonstrates that after interviewing petitioner, his sisters and his mother, counsel believed that there was little

mitigation evidence available to assist petitioner. However, the transcript of the sentencing hearing establishes that counsel introduced evidence of petitioner's background and family life and such evidence was heard by the jury through petitioner's sister and father. Petitioner's sister testified that petitioner was one of fourteen children and that, except for one speeding incident in which she was involved after petitioner's arrest, no member of the family ever had legal problems. Petitioner's father testified that he started traveling to the United States in 1966 to do agricultural work and that, except for speeding violations; he also never had any legal troubles. While counsel did not introduce evidence of petitioner's drug and alcohol use, evidence that both petitioner's parents had multiple children with different partners, or evidence that petitioner supported five children borne of three different women, counsel is not ineffective for failing to present evidence that could be "cross-purpose evidence" capable of aggravation and mitigation. *See Barnes v. Thompson*, 58 F.3d 971, 980-981 (4th Cir. 1995), *cert. denied*, 516 U.S. 972 (1995); *Lovitt v. Warden*, 585 S.E.2d 801, 825 (Va. 2003). Petitioner fails to proffer additional information that counsel should have discovered or presented during the penalty phase of petitioner's trial that would have assisted in mitigating his offense of capital murder. For example, there is not sufficient evidence in the record from a psychologist or

> a psychiatrist to show that petitioner's background and family life had an effect upon his development. *See Lovitt*, 585 S.E.2d at 825.
>
> Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigation evidence, the result of the proceeding would have been different. In finding no prejudice, the Court has weighed the evidence in aggravation against the mitigation evidence presented at the penalty phase of the trial and on habeas. *See Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2542 (2003); *Lovitt*, 585 S.E.2d at 825-26.

(JA 317-19).

C. The federal district court's habeas corpus hearing on the claim

The district court ordered an evidentiary hearing over the Warden's objection. Bell was permitted, again over the Warden's objection, to present evidence from Carmeta Albarus, a self-proclaimed "mitigation specialist" of Jamaican heritage, who gave her post-death penalty, hearsay version of Bell's happy life in Jamaica before he moved to this Country and became a drug dealer and murderer. Ms. Albarus, a licensed clinical social worker in New York, is not accredited by any social work association and was criticized for a

lack of training and for taking credit for another's work in *State v. DiFrisco*, 804 A.2d 507, 549-50 (N.J. 2002).

According to this habeas witness, Bell enjoyed a wonderful life in Jamaica and was loving to his Jamaican girlfriend (later wife) before he abandoned her and his unborn child to move to the United States and take up with numerous new American girlfriends. Ms. Albarus said Bell was nicknamed "Slow" in Jamaica and admitted this was because he was considered lazy. (JA 1445-47). In fact, this information was not new because the jury heard that Bell's nickname was "Slow" when that fact was brought out by the prosecutor at sentencing. (JA 180). However, trial counsel Fischel testified at the habeas hearing that he knew Bell's nickname in this Country was "Fast Eddie," *a fact the jury never heard*. (JA 1849). Ms. Albarus admitted that Bell was not considered retarded in Jamaica. (JA 1447).

Dawn Jones told Ms. Albarus that Bell had beat her. (JA 1453-54). Bell's sisters told Ms. Albarus that Bell was known as a "mama's boy," Bell was not abused, physically or sexually, and Bell's father provided well for the family. (JA 1471). Although Ms. Albarus knew about aggravating evidence in the case, she did not include any of it in her report to habeas counsel: Bell was fired from a job in the States for falsifying a drug screen test; Bell threatened sheriff's deputies; Bell committed domestic violence on his various girlfriends. (JA 1472-75).

Ms. Albarus said she found two law enforcement witnesses in Jamaica to say Bell really liked police officers, but admitted she never told these witnesses that Bell had threatened to kill sheriff's deputies in this Country, dealt drugs and murdered a police officer. She conceded if those facts were true, then Bell was a different person than she had been led to believe. (JA 1482-83). Ms. Albarus charged Bell's habeas counsel at least $ 20,000 for her work on the case, an amount it was undisputed that the trial court in Bell's case never would have authorized for mitigation services when Bell was tried. (JA 1481, 1924, 1941).

No one, including Bell's trial counsel, Ms. Albarus, Dr. Stejskal or Bell's current habeas counsel, were able to find any records of Bell's schooling, medical or employment history.

Bell presented the testimony of Dr. Stejskal at the habeas hearing. Stejskal shockingly disavowed the very words he had written in his mitigation report before trial and denied the proclamations of his own employer – The Institute of Law, Psychiatry and Public Policy – as to that institution's role as a self-professed mitigation-gathering vehicle for defense attorneys representing capital murderers. (JA 1354-62). Trial counsel Jud Fischel testified he was "flabbergasted" at the way Stejskal's current testimony contradicted what Stejskal had told counsel before trial about his extensive role as a mitigation expert. (JA 1834). To repeat, Dr. Stejskal found in his pretrial testing that Bell was a faker and

malingerer and found no evidence of retardation. He found no statutory mitigating factors and completed a comprehensive background and family history and determined that the evidence was "double-edged." He told trial counsel not to use him as a witness because it would reveal too much aggravating evidence.

Dawn Jones testified at the habeas hearing that Bell was "very sweet, real charming," Bell stood by her when her pregnancy by him was difficult, and Bell chipped in paying bills when she could not work due to the complications (JA 1491-94). She also repeated the incident – which she had testified to at trial – after she and Bell had broken up, in which she had to call the police because Bell "pulled" a gun on a man in her house. (JA 1496). She admitted that Bell had beat her "maybe three or four" times. (JA 1505). *At trial, the jury never heard her habeas testimony that Bell had beat her.*

The district court also allowed testimony from Joann Nicholson, Tracey Nicholson's mother. Joann testified that Bell loved his illegitimate children and helped take care of them, although she admitted he paid no child support, she provided him a home and loaned him money and she did not know how he supported five children. (JA 1524, 1531-33). She also said that she had been present during an incident, presented at trial through the victim's detailed eyewitness testimony – the victim being another one of Bell's ex-girlfriends – in which Bell brutally assaulted the girlfriend. Nicholson said that she saw the argument and that no assault occurred. She had

no explanation for why she said nothing at the time of trial when the event occurred and Bell presented no testimony from the victim or any other eyewitness.

The district court also allowed Precious Henderson, a young woman of Jamaican heritage who knew Bell in this Country, to testify about Bell. Ms. Henderson testified that she got Bell a job at Southeastern Containers and that Bell was a good employee, but was fired because he failed a drug screen test. (JA 1542). She did not know that Southeastern Containers fired Bell because he *falsified* the drug screen test and then *refused* to take another test. (JA 1544, Presentence Investigation Report dated May 30, 2001, at 7-7a). *The jury never heard about Bell's poor conduct at jobs in this Country.*

Barbara Williams, Bell's ex-wife from Jamaica, also testified at the habeas hearing. She testified that Bell was a loving person and had many police officer friends in Jamaica. She was unaware that Bell had been convicted of assault in Jamaica and did not know until apparently recently that Bell had murdered a police officer in Winchester. (JA1557-58). When Ms. Williams went into premature labor in Jamaica with their child, Bell left the Country and moved to the United States, returning the following year to marry her. (JA 1550-51). Bell successfully kept secret from Ms. Williams for years the fact that he had girlfriends in the States by whom he had fathered four children. (JA 1560). After she and Bell divorced, Bell maintained a loving relationship with

their daughter. Ms. Williams' sister, Carol Anderson, testified that Bell was an upstanding, wonderful, loving young man when she knew him in Jamaica. (JA 1566).

The district court found that trial counsel failed under *Wiggins v. Smith*, 539 U.S. 510 (2003), to adequately investigate mitigating evidence because they did not interview Dawn Jones in this Country, Barbara and Carol Williams in Jamaica and, to a lesser extent, Precious Henderson. The court faulted counsel for not calling Joann Nicholson as a witness to say favorable things about Bell and to rebut the eyewitness testimony of the ex-girlfriend Bell assaulted. (JA 2026-28). The court found it unreasonable for counsel to have relied on Dr. Stejskal as a mitigation expert. (JA 2029). It dismissed trial counsel's explanations for why these witnesses did not fit within their sentencing strategy. (JA 2028-31). The court inexplicably found that trial counsel "put on no mitigation evidence at all." (JA 2030).

The district court, however, found that, even if all the evidence presented at the hearing had been presented to the jury, the jury still would not have returned a life sentence (the same conclusion the state habeas court had reached) and thus denied the claim of ineffective assistance of counsel. (JA 2032).

D. The Fourth Circuit's decision

The Fourth Circuit ruled as follows:

> We conclude that the district court correctly found that the finding of the Supreme Court of Virginia on prejudice was reasonable, and therefore Bell is not entitled to relief on his claim of ineffective assistance of counsel. Under these circumstances, it is unnecessary for us to address the district court's conclusion that the finding of the Supreme Court of Virginia that Bell did not receive deficient performance was unreasonable. . . . In concluding that counsel's performance did not prejudice Bell, the Supreme Court of Virginia found that the evidence from Bell's witnesses constituted cross-purpose evidence, which is evidence capable of both aggravation and mitigation. *See Barnes v. Thompson, 58 F.3d 971, 980 (4th Cir. 1995)* (citations omitted). In making its prejudice determination, the Supreme Court of Virginia weighed this cross-purpose mitigation evidence against the evidence in aggravation. *See Wiggins, 539 U.S. at 534.*
>
> At the district court's evidentiary hearing, Bell presented testimony from the five witnesses he claims should have testified for him during the penalty phase of the trial. After reviewing testimony from these witnesses, the district court concluded that the Supreme Court of Virginia was reasonable in finding that the absence of their testimony did not prejudice Bell

because the evidence in aggravation outweighed the mitigation evidence presented at trial and on state and federal habeas.

In reviewing the district court's decision that the Supreme Court of Virginia was reasonable in finding no prejudice, we review the evidence that the district court found would have been the most beneficial to Bell had it been presented during the penalty phase of Bell's trial. After its evidentiary hearing, the district court identified Dawn Jones, Barbara Bell Williams, Carol Baugh Anderson[4], and Joanne Nicholson as Bell's strongest witnesses.[5]

[4] This witness is referred to as Carol Baugh Williams in the district court's oral order.

[5] Bell also presented testimony from his coworker, Precious Henderson, but the district court considered her testimony less helpful because she was unaware that Bell had been terminated from his job for substance abuse.

Ex-girlfriend Dawn Jones testified that Bell helped pay her bills when she was pregnant and was a good father to their child. However, Jones also testified that Bell physically assaulted her three or four times during their five-year relationship. While Jones was pregnant in 1993, Bell returned to Jamaica and married Barbara Williams, with whom he had previously fathered a

child. Furthermore, after their relationship ended, Bell displayed a firearm during an argument with a man at Jones' house.[6] Finally, although Bell sent gifts to Jones, he never paid child support.

[6] Jones is the only one of the five witnesses to testify during the penalty phase of the trial. She testified for the prosecution regarding Bell's display of a firearm during this incident.

Ex-wife Barbara Williams testified that Bell was hard-working, loving, and a good father. However, she also testified that while she was pregnant in 1992, Bell left her and went to the United States. Bell never paid child support to Williams.

Prior to moving in with Williams, Bell lived in the same house with her sister, Carol Baugh Anderson, for approximately eighteen months.[7] Anderson testified to the district court that Bell was hard-working, helpful around the house, and non-violent. However, Anderson's testimony allowed the prosecution to question her on Bell's relationship with her sister.

[7] Carol Baugh Anderson testified to the district court that she and Bell lived in separate rooms and did not have a romantic relationship.

Joanne Nicholson is grandmother to the three children Bell fathered with his ex-girlfriend, Tracy Nicholson. Joanne testified to the

district court that Bell was a good father and that she never saw him hit Tracy. However, her testimony was undermined by police reports showing that Bell assaulted Tracy. Joanne also testified that she saw the incident with Billy Jo Schwartz and stated that Bell did not have a gun and did not hit Tracy. However, Schwartz testified that Joanne was not present when Bell held a gun to Schwartz's head. Additionally, Joanne's account of the incident conflicts with both Schwartz's testimony and Tracy's affidavit.[8] Finally, her testimony allowed the prosecution to emphasize that Bell gave gifts, but did not provide child support to Tracy.

[8] Both Tracy and Schwartz state that during the incident Tracy was on top of Bell's car while it was moving. Joanne denied that Tracy was ever on top of Bell's car.

After review, we conclude that the district court correctly concluded that the finding of the Supreme Court of Virginia on prejudice was reasonable. Evidence from each of these witnesses was cross-purpose because it would have allowed the prosecution to emphasize multiple instances of Bell's infidelity; abandonment of his children, wife and girlfriend; domestic abuse; and failure to provide child support. Furthermore, focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer

> Timbrook, whose death left behind a pregnant wife. When weighed against the aggravating factors of Bell's criminal record and propensity for violence, we find it reasonable for the Supreme Court of Virginia to conclude that the factors in aggravation outweighed the mitigation evidence. Accordingly, we affirm the district court's decision denying Bell's petition for writ of habeas corpus.

Bell, 2008 U.S. App. LEXIS 125, *16-21.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED

I. This Court Has No Jurisdiction To Review Bell's Lethal Injection Claim.

Bell admits that the court below denied him a Certificate of Appealability (COA) on his lethal injection claim. (Pet. at 34). He admits that the Fourth Circuit applied the proper standard of review in denying him a COA. (Pet. at 34). He does not ask this Court for review of the COA decision; neither does he present any argument to this Court on such an issue. Indeed, Bell presents little argument on the lethal injection claim itself: he simply states in conclusory fashion that Virginia will use the same chemicals in his execution that Kentucky uses. (Pet. at 33).

Bell asks this Court to stay his execution until the Court decides *Baze v. Kentucky*, to grant his petition, vacate the Fourth Circuit decision and remand his case for further proceedings not inconsistent with the as-yet-undecided *Baze*. (Pet. at 34-35). He says that it would be a "miscarriage of justice" were he to be executed before this Court's decision in *Baze* is issued. However, Bell makes no argument under – and barely mentions – the governing standard in *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), that, before a stay may be granted in a habeas case, there must exist "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; . . . a significant possibility of reversal of the lower court's decision; and . . . a likelihood that irreparable harm will result if that decision is not stayed." He does not acknowledge the preclusive effect of 28 U.S.C. § 2253 which preconditions jurisdiction upon a grant of a COA in a habeas case.

Given the posture of Bell's case, he cannot make the required showing under *Barefoot*. Further, this Court could not vacate the Fourth Circuit's decision because that judgment simply did not encompass Bell's lethal injection claim: there was no jurisdiction to have decided it.

As shown above, Bell made a claim of trial court error in the Virginia Supreme Court *on direct appeal*, but that claim merely asked for reversal because the trial court had denied him an evidentiary hearing on

the constitutionality of lethal injection. That state-law, direct appeal issue is not before this Court in Bell's collateral, federal habeas corpus case. Indeed, the time for certiorari review of that issue passed when Bell filed his certiorari petition on direct appeal and failed even to mention anything about lethal injection. *See Bell v. Virginia*, No. 02-7230, 537 U.S. 1123 (2003).

Bell did not renew his claim in the Virginia Supreme Court in his state habeas petition and the Virginia Supreme Court never addressed it after its direct appeal decision. As shown above, the state court in its direct appeal decision expressly *declined* to decide whether lethal injection violated the Constitution because, under Virginia law, inmates may chose another method that has been upheld as constitutional. *See Bell v. Commonwealth*, 563 S.E.2d at 715.[3]

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[3] Bell's apparent attempt now (Pet. at 34) to escape the *Bell* decision on direct appeal by proclaiming that he has not "chosen" a method, but rather, by *not choosing*, the Commonwealth has chosen lethal injection for him, is most disingenuous. The Virginia statute, Code § 53.1-234, provides for lethal injection for inmates who refuse to choose and that procedure is explained to the inmate before he chooses or refuses to choose. The federal courts in cases under 42 U.S.C. § 1983 involving challenges by Virginia inmates to Virginia's lethal injection procedures correctly have held that a decision *not to choose* is a choice for lethal injection. *See Reid v. Johnson*, 333 F. Supp. 2d 543, 552 (E.D. Va. 2004), *stay denied*, No. 04 25 (4th Cir. 9/8/04), *stay denied*, 542 U.S. 963 (2004). Clearly, Bell chose lethal injection when he knowingly chose *not to choose*.

Bell presented his direct appeal claim to the federal district court only in his § 2254, habeas corpus case decided below. The only question before the federal habeas court on the issue was whether the Virginia Supreme Court's direct appeal decision *declining to adjudicate the constitutional issue* was unreasonable under 28 U.S.C. § 2254(d). The federal habeas court properly decided it had not been unreasonably adjudicated by the Virginia Supreme Court on direct appeal. *Bell*, 413 F.Supp. 2d at 736-37. There was no claim attacking the constitutionality of Virginia's lethal injection process before the federal habeas court which was capable of review on its merits, and none was decided.

Not surprisingly, both the federal district court and the court of appeals below declined to issue a COA on the only issue before the federal courts: whether the Virginia Supreme Court's direct appeal decision had been unreasonable under § 2254(d). That is the only issue which was even capable of presentation to this Court in Bell's federal habeas case, but only if the Fourth Circuit had decided to take jurisdiction over it by a grant of a COA. Again, Bell does not contest the decision of the Fourth Circuit to deny him a COA. There thus is no issue regarding the merits of a constitutional attack on lethal injection procedures in Virginia that is capable of review in Bell's federal habeas case.

"[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v.*

Cockrell, 537 U.S. 322, 336 (2002) (construing 28 U.S.C. § 2253). The Fourth Circuit's denial of a COA divested the habeas courts of jurisdiction to determine his lethal injection claim.

Even if a COA had been granted and the Fourth Circuit had ruled as the district court did, the issue still would not warrant a stay of execution under *Barefoot*. Again, the issue was that decided on direct appeal in 2002. *See Bell v. Commonwealth*, 563 S.E.2d at 715. There is no probability that this Court would grant certiorari review to decide whether the Virginia Supreme Court's direct appeal decision in 2002 was unreasonable, much less a significant possibility of reversal.

Clearly it cannot have been unreasonable under § 2254(d). Courts historically avoid deciding constitutional issues when they can. Because Virginia provides inmates with a choice, they always can chose a method that has been upheld as constitutional. They thus should not be heard to complain about a method they do not have to chose. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (holding, in § 2254 case, that inmate waived objections to lethal gas where the State provided him with the option of choosing another method).

Bell's case is a federal court habeas case, governed by § 2254. Section 2254(d) permits a grant of federal habeas relief only where the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Given this Court's 1999 *LaGrand* decision, the Virginia Supreme Court's 2002 almost identical decision cannot have been unreasonable under § 2254(d). Bell's lethal injection issue is not capable of review in this habeas corpus certiorari proceeding and thus is not deserving of a stay of execution under *Barefoot*.

II. Bell's § 2254(d) Argument Presents No Compelling Reason For Review.

Bell argues that the Fourth Circuit improperly applied § 2254(d) to his claim that his trial counsel were ineffective because they allegedly did not properly investigate and present mitigating evidence. He says that § 2254(d) simply does not apply after there has been an evidentiary hearing in federal court. He contends that there is a conflict among the circuits and that this Court "reserved" the issue in *Holland v. Jackson*, 542 U.S. 649, 653 (2004).

Certiorari review of this issue is not warranted, much less compelled, *see* U.S.Sup. Ct. R. 10, because Bell did not make the argument below until he filed a petition for rehearing. Bell was required by appellate rules to provide the Fourth Circuit with the standard of review he believed applied to his case. *See* FRAP 28. He simply failed to make the argument he makes

now. Certiorari should not be granted to review an issue never briefed, argued or decided below.

Furthermore, this Court did not "reserve" the issue for later decision. In *Holland*, this Court found the federal court in error because it had made no attempt to account for a *de novo* review of evidence held inadmissible in state court: "[t]he District Court made no finding that respondent had been diligent in pursuing Gooch's testimony (and thus that § 2254(e)(2) was inapplicable) or that the limitations set forth in § 2254(e)(2) were met. Nor did the Sixth Circuit independently inquire into these matters; it simply ignored entirely the state court's independent ground for its decision, that Gooch's statement was not properly before it." This Court did not identify any issue regarding § 2254(d) and/or evidentiary hearings which it deemed important to resolve.

In fact, in *Holland*, this Court recognized the Fourth Circuit as a court which employs precisely the standard Bell proposes in this Court. 542 U.S. at 653. Bell tries to explain this away by arguing now that the Fourth Circuit has adopted a split standard – one for *Brady* claims and a different one for *Strickland* ineffective assistance claims. (Pet. at 20). However, there is no indication in the decision below or in any other Fourth Circuit decision that it has backed off from its § 2254 *de novo* rule observed by this Court in *Holland*. What Bell fails to recognize is that the "*de novo* review of new evidence" standard he proposes to this Court simply could not apply to his case, and therefore was not used by the Fourth Circuit, because

his federal evidentiary hearing developed nothing that had not already been presented in fact or in kind to the Virginia Supreme Court.

The evidence Bell alleged in state court to support his claim was about his background, including his life in Jamaica, his Jamaican ex-wife and child and his ex-girlfriends and children in the United States and about Nicholson's supposed witnessing of the sentencing evidence of Bell's assault on an ex-girlfriend. He specifically presented affidavits to the Virginia Supreme Court from his father, ex-wife, two ex-girlfriends, Nicholson and numerous experts. Most of these witnesses were presented to the federal district court at the federal habeas hearing. Because the federal district court found that their testimony did not prove prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) – *the identical conclusion reached by the Virginia Supreme Court without a hearing* – it was obvious that there had been no need for a federal court evidentiary hearing in the first place.

The Fourth Circuit utilizes the *de novo* standard proposed by Bell where *new evidence* has been unearthed for the first time in an authorized federal habeas hearing. *See Holland*, 542 U.S. at 653 (recognizing *Monroe v. Angelone*, 323 F.3d 286, 297-299 (4th Cir. 2003), as an example of a court of appeals that gives *de novo* review to evidence admitted for first time in federal court). In Bell's case, however, that simply did not occur. The *de novo* standard proposed by Bell thus could not apply in his case even if

this Court were to embrace it for evidence newly-discovered in an authorized habeas hearing.

Upon closer inspection, the "conflict" identified by Bell simply does not exist. He says that the Ninth and Tenth Circuits employ the standard he wants. The Ninth and Tenth Circuit cases he cites hold that the federal habeas court may hold a hearing whenever the state court has denied one and that the new evidence is not entitled to deference under § 2254(d). (Pet. at 18). Apart from the fact that these cases appear to be in violation of the very holding of this Court in *Holland* that a federal court must first determine that new evidence may be received under § 2254(e) before considering it, the cases simply apply, by their own rule, to *new* evidence. Again, there was no new evidence presented in Bell's federal habeas hearing. The Virginia Supreme Court considered it and found no reasonable probability that the jury would have rejected a death sentence had it heard the evidence. It was that decision to which the Fourth Circuit properly deferred under § 2254(d). Bell's attempt to make of his case an interesting conflict to be resolved fails because it simply does not fit within the very conflict he perceives.

III. The Fourth Circuit Did Not Adopt A Categorical Rule About Double-Edged Evidence.

Bell argues that the Fourth Circuit has adopted a rule that whenever "double-edged" evidence is alleged

as grounds for an ineffective assistance claim, trial counsel cannot be found ineffective for failing to investigate or present it. He then extrapolates from that perceived rule that there is a conflict among the circuits that this Court needs to resolve. However, Bell misreads the Fourth Circuit's decision and misidentifies a conflict where there is none.

The Fourth Circuit faithfully applied both the controlling standard in § 2254(d) and this Court's clear precedents about ineffective assistance claims. First, the Virginia Supreme Court resolved Bell's claim on the prejudice prong of *Strickland*. (JA 317-19). The Fourth Circuit therefore properly applied the deference standard of § 2254(d), as required by this Court. *Bell*, 2008 U.S.App. LEXIS 125 at *15 (citing *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007)).

Second, contrary to Bell's misreading, the Virginia Supreme Court did not find a lack of prejudice because cross-purpose evidence was at issue, but rather it found the contested evidence *was* cross-purpose in character, *and then* "weighed this cross-purpose mitigation evidence against the evidence in aggravation" as required by "*Wiggins*, 539 U.S. at 534." *Bell*, 2008 U.S.App. LEXIS 125 at *17-18. It is this decision by the Virginia Supreme Court which the Fourth Circuit found to be reasonable under § 2254(d). *Id*. It did not find that the existence of cross-purpose evidence trumped a claim of ineffective assistance.

The Fourth Circuit then reviewed the evidence which the district court said it found to be mitigating, the very evidence which the Virginia Supreme Court also had weighed against the aggravating factors in the case. *Bell*, 2008 U.S.App. LEXIS 125 at *18-21. The Fourth Circuit found, as the Virginia Supreme Court had found, that the evidence was indeed "cross-purpose" evidence:

> Evidence from each of these witnesses was cross-purpose because it would have allowed the prosecution to emphasize multiple instances of Bell's infidelity; abandonment of his children, wife and girlfriend; domestic abuse; and failure to provide child support. Furthermore, focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook, whose death left behind a pregnant wife.

Id. at *21. Bell's attempt in his petition in this Court to portray his evidence as good character evidence is preposterous. His witnesses who spoke well of Bell years after a death sentence had been imposed hardly were good character witnesses. As the Fourth Circuit found, they spoke of his abandoning his wife, adulterous affairs, illegitimate children for whom he provided no financial support and domestic abuse. The jury never heard about these bad character qualities. Whatever can be said about the evidence, it cannot be said it was not at least double-edged.

But more importantly, the Fourth Circuit's decision does not support in any way Bell's charge in this Court that it treats cross-purpose evidence as a claim-ender. Quite the contrary. The Fourth Circuit gave § 2254(d) deference to the Virginia Supreme Court's decision precisely because it weighed the evidence alleged to be mitigating "against the aggravating factors of Bell's criminal record and propensity for violence." *Bell*, 2008 U.S.App. LEXIS 125 at *21. That weighing is what this Court requires. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Bell's real complaint is that he simply disagrees with the outcome of his fact-bound case. The cases he cites for the proposition that the Eleventh, Third and Tenth Circuits and the Georgia Supreme Court conflict with other circuits and state courts demonstrate nothing more than the fact that evidence in some cases, when weighed against the aggravating factors, proves a reasonable probability that the jury would have sentenced the defendant to life instead of to death. (See cases cited in Petition at 24-27). The Fourth Circuit utilized no categorical rule in this, or any other, case that the mere appearance of double-edged evidence negates a claim of ineffective assistance.

Bell's recitation of the evidence he says was considered by the district court in his case is quite misleading. He presents this Court with a compilation of citations to the record but fails to inform the Court that much of what he describes in

his petition was not evidence which was considered by the District Judge because it was not admitted at the federal habeas evidentiary hearing; rather it comes from pre-hearing written statements from witnesses he did not produce at the hearing, or hearsay from an investigator whose testimony never would have been admissible in a Virginia capital sentencing hearing before a jury, and which was not credited by the District Judge. *See Buchanan v. Commonwealth,* 384 S.E.2d 757, 773 (Va. 1989) ("[E]xperts in criminal cases must testify on the basis of their own personal observations or on the basis of evidence adduced at trial.").

Contrary to Bell's assertion, the Fourth Circuit did not agree with the district court's opinion that trial counsel's conduct was unreasonable under *Strickland*. It simply found it unnecessary to make any ruling on *Strickland*'s first prong. *Bell*, 2008 U.S.App. LEXIS 125 at *17 (citing *Strickland*, 466 U.S. at 697-98). The Fourth Circuit expressly declined even to "decide whether the district court correctly granted an evidentiary hearing" precisely because it agreed with the district court's conclusion that the Virginia Supreme Court reasonably had dismissed the claim for lack of prejudice. *Bell*, 2008 U.S.App. LEXIS 125 at *15 n.1.

The evidence actually relied upon by the District Judge is accurately described by the Fourth Circuit. The District Judge cited the four witnesses discussed above and explained that he gave less credit to a fifth witness who did not know Bell well enough to know

that he had been fired for falsifying a drug screen test at their place of employment. *Bell*, 2008 U.S.App. LEXIS 125 at *18-19 & n.5. As described above, these witnesses – an ex-wife and her sister, an ex-girlfriend, and an ex-girlfriend's mother – provided harmful details about Bell's life which did not come out at trial. Bell inaccurately argues that these harmful facts already were before the jury: the jury never heard about the abandonment, adultery, illegitimacy, domestic abuse and lack of child support. To say this evidence was not dangerous to the defense in a case involving a drug dealer with a criminal history (and no history of deprivation or abuse) in a small town who gunned down a police officer who had not even unholstered his firearm, leaving the officer's young widow pregnant with a first son he never would see, is simply to ignore the obvious aggravating use to which the prosecutor would have put it.

Contrary to Bell's assertion, trial counsel did present two family witnesses in mitigation, as described above. However, the problem counsel had was that there was no evidence from any other source – expert, records or witnesses – which would not have hurt as much as helped their case. Recently, the Fourth Circuit addressed a case involving a claim that trial counsel were ineffective precisely because they elected *to present* all the cross-purpose background evidence like Bell faults his counsel for *not* presenting. *See Cagle v. Branker*, __ F.3d __, 2008 U.S. App. LEXIS 5643 at *19 (4th Cir. March 17, 2008). *See also Truesdale v. Moore*, 142 F.3d 749, 754-55 (4th

Cir. 1998) ("Failure to present particular mitigating evidence often leads to claims that counsel should have introduced such evidence or investigated further. On the other hand, the introduction of evidence that the jury does not credit or that the state turns to its advantage leads to ineffectiveness claims also.").

This ineffective assistance "catch 22" only highlights what this Court emphasized in *Strickland*:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

466 U.S. at 689. Bell invites this Court to reopen a fact-intensive record to decide an issue of attorney performance in a case where the lower court avoided "grading counsel," *see Strickland*, 466 at 697 ("The object . . . is not to grade counsel's performance"), in favor of relying on the reasonable decision of the state court finding an abundant and accessible lack of prejudice. This Court should reject Bell's invitation because it presents no unsettled issue of law but rather only an application of existing law to particular facts.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

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Sussex I State Prison,
Respondent herein.

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EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit And Application For Stay Of Execution

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IN THE
Supreme Court of Virginia

RECORD NO. 011777

EDWARD NATHANIEL BELL,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

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measure of punishment in retribution for the "guilt" of the unadjudicated crime. This not only is an improper use of such evidence, but is particularly problematic when admission of the alleged misconduct is not subject to any procedural safeguards. Accordingly Bell's sentence was imposed in violation of Eighth Amendment and due process guarantees and his death sentence should be vacated.

XIV. BELL WAS PROHIBITED FROM OBTAINING AND PRESENTING EVIDENCE CONCERNING THE CONSTITUTIONALITY OF THE COMMOWNEALTH'S EXECUTION PROCEDURES, IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES (26)

The trial court's refusal to permit Bell an evidentiary hearing so that he could compel the production of evidence to support a challenge to the procedures by which the Commonwealth intends to execute Bell, JA 203-210, 731-55, 770 violated Bell's rights under the Due Process Clause of the Fourteenth Amendment.

Bell's substantive rights under the Eighth and Fourteenth Amendments are clearly implicated by the protocol the Department of Correction chooses to adopt to execute him. *See Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 464 (1947) (plurality opinion). "[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is or was, afforded to him some real opportunity to protect it." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 162 (1951) (Frankfurter, J, concurring) (citation omitted). At a minimum, due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). Executing Bell without providing him the opportunity to present evidence concerning the Commonwealth's lethal injection procedures is a deprivation of that right. Even when a method of execution is not unconstitutional per se, it may be unconstitutional in particular circumstances if the State has failed to ensure that its protocols comply with the Eighth Amendment. *See, Rupe v. Wood,* 863 F.Supp. 1307, 1313 (W.D. Wash. 1994). An evidentiary hearing would provide a procedural safeguard to enable the court to meaningfully assess whether the execution procedures will violate Bell's substantive rights. Advanced procedural safeguards, such as an evidentiary hearing, are not required every time governmental action intrudes on citizens' rights. But in this particular situation, the opportunity to complain of any abridgment of his rights after the

fact would be of little help to Bell. *See, Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-20 (1977) ("advance procedural safeguards" required before power company can terminate service for failure to pay, due to "uniquely final" nature of the deprivation). Accordingly, these proceedings should be stayed and Bell's cause remanded to permit him a hearing on his claim that the Commonwealth's method of execution is cruel and unusual in violation of Bell's Eighth Amendment rights.

XV. THE DEATH PENALTY AS APPLIED IN VIRGINIA IS UNCONSTITUTIONAL (27)

Virginia's capital sentencing scheme violates the Eighth, Sixth, and Fourteenth Amendments and corresponding clauses in the Virginia Constitution in several respects. The "future dangerousness" aggravator is inherently unreliable and is so vague that it fails to adequately guide the jury's discretion. *See Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). The definition for "future danger" does not provide a juror with any guidance: "criminal acts of violence" suggests no degree of criminality or violence; "continuing threat" may suggest varying levels of imminence and continuation; and "serious" has several meanings even within the dictionary. See Webster's New World Dictionary 1225 (3d ed. 1988). Further, "future dangerousness" predictions are inherently unreliable. See Marquart & Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital*

Offenders, 23 Loy. L.A.L. Rev. 5 (1989) (finding only one in 239 future dangerousness predictions accurate). Virginia's statutory scheme also violates the Eighth and Fourteenth Amendments heightened reliability requirement for capital sentencing because it allows the Commonwealth to prove future dangerousness by evidence of unadjudicated criminal conduct and fails to require that the state satisfy any standard of proof before such

* * *

IN THE DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

EDWARD N. BELL,	:	
Petitioner,	:	**Case No.**
v.	:	**7:04CV00752**
LORETTA K. KELLY, Warden,	:	
Respondent.	:	

BELL'S MOTION FOR EXPANSION OF THE CERTIFICATE OF APPEALABILITY

NOW COMES EDWARD NATHANIEL BELL, Petitioner, by counsel, and moves this honorable Court to expand the Certificate of Appealability issued in this case.

A *habeas* petitioner may not proceed with an appeal unless the district court or circuit court has issued a Certificate of Appealability (COA) for an issue raised in the Petition. Upon an appeal, Federal Rule of Appellate Procedure 22(b)(1) requires the district judge to either issue a COA or state why a certificate should not issue. Although many ambiguities remain in the law surrounding COAs, it appears that a district court must follow this requirement for each issue. Accordingly, Bell requests this Court to expand the COA to include each issue raised in the Amended Petition for Writ of Habeas Corpus.

Procedure governing COAs

The granting of a COA gives the Court of Appeals jurisdiction over this *habeas* case. *See Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). Although no statute limits appellate jurisdiction to issues identified in a COA, it is the better practice for a *habeas* petitioner to request a COA for each issue.

Title 28 U.S.C. § 2253(c)(1) provides that a *habeas* petitioner may not take an appeal to the Court of Appeals unless a COA is issued. Federal Rule of Appellate Procedure 22(b), in turn, states in relevant part that, "If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue."

Rule 22(b) was originally enacted at a time when a *habeas* appeal required a Certificate of Probable Cause (CPC), rather than a COA. The Commentary to the original rules explained, "In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district court to issue the certificate or state the reasons for its denial."

In § 2254 cases, the principal difference between a CPC and a COA is that, "The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." § 2253(b)(3). The 1998 amendments

to Rule 22(b) brought the Rule into conformity with the 1996 change from CPCs to COAs in § 2253, but did not address the change in focus from the case as a whole to individual issues.

Although § 2253(b)(3) does not limit appellate jurisdiction to issues identified in a COA, some courts have limited appellate review to the issues listed in a COA. *See, e.g., Boysiewick v. Schiro,* 179 F.3d 616, 622 (8th Cir. 1999). Accordingly, out of an abundance of caution, Bell asks this Court to follow the requirements of Rule 22(b) for each issue and grant a COA for each issue raised in the Amended Petition.

Issues for expansion of COA

This Court has already granted a COA for the issue of ineffective assistance of counsel in the mitigation phase. This Court has not ruled, however, on the issue of a COA for the remaining issues. Petitioner now seeks a COA on all remaining issues.

The Supreme Court has explained the relevant standard for grant of a COA. Where a district court has rejected the constitutional claims on the merits, "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would

find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists or reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Interestingly, the *Slack* holdings speak in terms of the petition rather than individual issues.

Bell respectfully requests the Court to issue a COA for all issues, including each subclaim and argument contained within the issues presented in the Amended Petition. These issues include the following:

1. The district court erred in granting the Warden's motion to dismiss Bell's Claim I, relating to *Napue* and *Brady* violations, without an evidentiary hearing when Bell has stated a valid claim that the prosecution concealed exculpatory information and suborned perjury from prosecution witnesses and where this Court refused to consider the Sheldon affidavit demonstrating the existence of these violations.

In Claim I, Bell stated a valid claim of denial of his Due Process rights. The prosecution concealed exculpatory information about, and in one case suborned perjury from, a series of prosecution witnesses. This Court's treatment of the *Napue* and *Brady* claims is at least debatable, given the abundant evidence Bell has produced in support of his claim. Indeed, the Terry Lee Johnson *Napue* claim is one of two claims which this Court asked the parties to address in oral argument.

To the extent that part of this Court's ruling on the *Napue* and *Brady* claims is procedural in nature, it is at least debatable that this Court erred in its procedural rulings. This Court's treatment of Jonathan Sheldon's affidavit is at odds with *United States v. Mason,* 52 F.3d 1286, 1292 (4th Cir. 1995), in which the Fourth Circuit approved the use of such attorney affidavits. In addition, this Court's application of the § 2254(e)(2) regarding new factual development is subject to serious debate, as Bell was even more diligent in state court fact development than the petitioner in *Williams v. Taylor,* 529 U.S. 420, 435-46 (2000).

2. The district court erred in granting the Warden's motion to dismiss Bell's Claim II, relating to Bell's attorney's actual conflict of interest, without an evidentiary hearing, when Bell's attorney previously represented a key witness against Bell and Bell properly presented the issue to the State court.

In Claim II, Bell stated a valid claim of how his attorney's prior representation of Terry Lee Johnson limited his representation in violation of his Sixth Amendment right to conflict-free counsel, in that his trial attorney's previous representation of Terry Lee Johnson limited his representation of Bell. Moreover, this Court's procedural ruling that Bell's "waiver" claim is defaulted because it could have been raised on direct appeal is also at least debatable given that Virginia prohibits raising ineffective assistance of counsel claims on direct appeal. *See, e.g., Lenz v. Commonwealth,* 544 S.E.2d 299, 304 (Va. 2001);

Dowell v. Commonwealth, 351 S.E.2d 915, 917 (Va. App. 1987). This Court's procedural ruling that Bell's actual conflict and ineffective assistance of counsel claims were not presented to the Virginia courts is at least debatable, as Bell did present these aspects of his claim in his Corrected Petition in state court. *See* Corrected Petition at 30, 42.

3. The district court erred in granting the Warden's motion to dismiss Bell's Claim III, relating to Bell's mental retardation, without an evidentiary hearing, even though there is substantial evidence that Bell suffers from mental retardation.

In Claim III, Bell stated a valid constitutional claim that his execution would violate the Eighth Amendment. This Court's conclusion that Bell is not mentally retarded as a substantive matter is at least debatable, given the extensive lay and expert evidence that Bell presented regarding his mental retardation. This Court asked the parties specifically to address this claim at oral argument. This Court's ruling that Bell's new evidence is barred by his lack of diligence is also at least debatable, as Bell exercised more diligence in state court fact development than the petitioner in *Williams v. Taylor,* 529 U.S. 420, 435-46 (2000).

4. The district court erred in granting the Warden's motion to dismiss the remainder of Bell's Claim IV, relating to other instances of ineffective assistance of counsel, without an evidentiary hearing.

This Court granted an evidentiary hearing on Claim IV(A), and granted a COA from the subclaim's denial. Bell also, however, stated a valid constitutional claim in the remainder of Claim IV that his counsel were ineffective on other grounds. This Court's substantive rejection of Bell's claim that he was not advised of his right to testify at the sentencing phase is at least debatable, given his trial counsel's affidavit that he "did not advise Mr. Bell on his right to testify at the punishment phase of trial." J. Fischel Aff. ¶ 19, State App. Ex. 19.

5. The district court erred in granting the Warden's motion to dismiss Bell's Claim V, relating to the assessment of future dangerousness, without an evidentiary hearing, when Virginia law substantially conflicts with governing Supreme Court precedent.

In Claim V, Bell stated a valid constitutional claim that flaws in Virginia's mechanisms for assessing future dangerousness denied his Fifth, Sixth, and Eighth Amendment rights. Reasonable jurists would debate this Court's denial on the merits of Bell's prison conditions claim because a serious conflict exists between Virginia law and *Skipper v. South Carolina*, 476 U.S. 1, 5-6 (1986). The *Ring* and *Apprendi* arguments that the Court found would not succeed if they had been raised have been a matter of national debate, and clearly may be debated by jurists of reason. The application of *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), to the jury's question about early release is also a matter which reasonable jurists may debate.

6. The district court erred in granting the Warden's motion to dismiss Bell's Claim VI, relating to violations of Bell's right to trial by jury, without an evidentiary hearing, when there was undisputed evidence that seated jurors had undisclosed relationships to the victim's family.

In Claim VI, Bell stated a valid constitutional claim that his Fifth and Sixth Amendment rights were violated by biased, predeliberating, and extraneous jurors. This Court's substantive denial of Bell's bias claim is at least debatable given the uncontradicted affidavit of alternate juror Miles regarding the relationship of seated jurors to the victim's family. *See* L. Miles Aff ¶ 4, State App. Ex. 13. This Court's resolution of the ineffective assistance of counsel issues, and thus the procedural default issues, is also debatable by jurists of reason.

7. The district court erred in granting the Warden's motion to dismiss Bell's Claim VII, relating to violations of Bell's right to presence at trial, without an evidentiary hearing.

In Claim VII, Bell stated a valid constitutional claim that the trial court violated his right to presence at trial. This Court's ruling that Bell cannot show ineffective assistance of counsel, and thus excuse his procedural default, is debatable given the number and extent of hearings for which Bell was absent and the unusual scenario of a retroactively-sworn witness.

8. The district court erred in granting the Warden's motion to dismiss Bell's Claim VIII, relating to Bell's shackling within sight of the jury, without an evidentiary hearing.

In Claim VIII, Bell stated a valid constitutional claim that the trial court deprived him of the presumption of innocence by shackling him in the sight of the jury. This Court's conclusion that Bell cannot excuse his procedural default for ineffective assistance of counsel is at least debatable in light of the clear evidence that at least one seated juror observed the shackles.

9. The district court erred in granting the Warden's motion to dismiss Bell's Claim IX, relating to violation of Bell's rights under the Vienna Convention, without an evidentiary hearing.

In Claim IX, Bell stated a valid constitutional claim that state authorities violated his rights under the Vienna Convention on Consular Relations. This Court's conclusion that Bell suffered no constitutional violation is fairly debatable, given this Court's expressed concerns about Virginia's failure to advise Bell of his Vienna Convention rights; the International Court of Justice has held that the Vienna Convention does create enforceable individual rights. *See Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (March 31); *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466 (June 27).

10. The district court erred in granting the Warden's motion to dismiss Bell's Claim X, relating to Virginia's DNA testing procedures, without an evidentiary hearing.

In Claim X, Bell stated a valid constitutional claim that Virginia's DNA testing procedures deny him the due process of law. This Court's procedural ruling that Virginia's newly created writ of actual innocence procedure does not permit Bell an opportunity to raise the claim in state court is fairly debatable, given that this question is one of first impression.

11. The district court erred in granting the Warden's motion to dismiss Bell's Claim XI, relating to Virginia's administration of the death penalty, without an evidentiary hearing.

In Claim XI, Bell stated a valid constitutional claim that Virginia's administration of the death penalty is unconstitutional. This Court's substantive and procedural rulings on this claim are fairly debatable by jurists of reason.

12. The district court erred in granting the Warden's motion to dismiss Bell's Claim XII, relating to Bell's execution procedures, without an evidentiary hearing.

In Claim XII, Bell stated a valid constitutional claim that Virginia's lethal injection procedures violate his Eighth Amendment rights. This Court's substantive decision that the decision of the Supreme

Court of Virginia was reasonable is debatable by jurists of reason, especially in light of the extensive authority Bell presented in support of his claim.

These issues present substantial constitutional and procedural issues. On all of this issues, this Court considered the issues to be sufficiently substantial to address the matters in published opinions. Bell's briefs in the Court on these matter set forth cogent, well-researched arguments which render the Court's rejection of Bell's position at least debatable.

Accordingly, this Court should issue a COA as to all issues because jurists of reason would find it debatable whether the petition states valid claims of the denial of a constitutional right and whether this Court was correct in its procedural rulings.

Respectfully submitted,

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Certificate

I certify that I have provided an electronic copy of this Motion to Senior Assistant Attorney General Katherine Baldwin through the Court's CM/ECF system.

(s) James G. Connell, III

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

EDWARD N. BELL, Petitioner,	)	Case No. 7:04CV00752
v.	)	**ORDER**
LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON, Respondent.	)	By: James P. Jones Chief United States District Judge

The petitioner has requested that the court grant an expanded Certificate of Appealability. For the reasons previously stated in opinions of record, I find that the petitioner has not made a substantial showing of a denial of a constitutional right as to issues other that described in the Certificate of Appealability issued September 18, 2006.

Accordingly, it is **ORDERED** that the Motion for Expansion of the Certificate of Appealability is DENIED.

ENTER: October 12, 2006

/s/ JAMES P. JONES
Chief United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWARD NATHANIEL BELL, **Petitioner-Appellant,** **v.** **LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,** **Respondent-Appellee.**	**Case No. 06-22**

MOTION TO EXPAND CERTIFICATE OF APPEALABILITY

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Bell independently argued that Virginia's post-conviction review process is so deficient as to deprive him of due process of law and equal protection. (*See* Pet. at 207-20.) The district court denied this claim, reasoning that "a challenge to Virginia's state habeas corpus proceedings, cannot provide a basis for federal habeas relief." 413 F. Supp. 2d at 735 (citing *Wright v. Angelone,* 151 F.3d 151, 159 (4th Cir. 1998)). Bell respectfully submits that *Wright* was wrongly decided, and is contrary to the Supreme Court's decision in *Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272 (1998). Accordingly, to preserve this issue for review by the Supreme Court of the United States, Bell respectfully submits that a COA should issue as to this claim.

IX. REASONABLE JURISTS COULD DIFFER AS TO BELL'S LETHAL INJECTION CLAIM

Bell argued that the "combination of chemicals used for lethal injection in Virginia" render lethal injection cruel and unusual punishment in violation of evolving standards of decency. 413 F. Supp. 2d at 657. The district court found this claim properly exhausted, but rejected it on two grounds.

First, the district court found that Virginia permits Bell to choose between electrocution and lethal injection. 413 F. Supp. 2d at 736-37. The district court held that Bell cannot challenge the constitutionality of lethal injection until he opts for that method of execution, and further held that should Bell opt for lethal injection, that would constitute a waiver of Bell's constitutional challenge. *Id.* (citing *Stewart v. LaGrand,* 526 U.S. 115 (1999)). Rather than recognizing this as an impermissible Catch-22, the district court used it as an excuse to deny relief. *Id.* Reasonable jurists could certainly differ on this holding. Bell has *not* yet elected a method of execution, and to appellant's knowledge, no court has ever applied *LaGrand* to a petitioner who has not yet chosen a method of execution. Quite to the contrary, in *Morales v. Tilton,* ___ F. Supp. 2d ___, 2006 WL 3699493, *2 (N.D. Cal. 2006), the court reached the merits of an Eighth Amendment challenge to lethal injection even though California offers inmates a choice between "lethal gas or lethal injection."

Second, the district court found that "no court decision, federal or state, . . . has found execution by lethal injection unconstitutional." 413 F. Supp. 2d at 737. That is no longer true. Multiple courts have now explicitly questioned the constitutionality of lethal injection. *See Taylor v. Crawford,* No. 05-4173-CV-C-FJC, 2006 WL 1779035 (W.D. Mo. June 26, 2006) (holding that Missouri's lethal injection protocol violates Eighth Amendment and staying executions in the state pending approval of a new protocol); *Morales,* ___ F. Supp. 2d at ___, 2006 WL 3699493 at *2 (holding that lethal injection protocol, as implemented, violated Eighth Amendment); *Cooey v. Taft,* 430 F. Supp. 2d 702, 706 (S.D. Ohio 2006) (staying the execution until further order of the Court because of the mounting evidence that the lethal injection protocol employed in Ohio is cruel and unusual); *Nooner v. Norris,* No. 5:06 CV00110 SWW (E.D. Ark. 2006) (holding that investigation into the state's lethal injection procedures was required); *see also Brown v. Beck,* 2006 U.S. Dist. LEXIS 60084, *24 (E.D.N.C. 2006) (requiring the presence of medical personnel who are qualified to ensure that plaintiff remains unconscious); *Evans v. Maryland,* ___ A.2d ___, 2006 WL 3716363, *46-48 (Md. Dec. 19, 2006) (holding that the protocols for the administration of lethal injection were ineffective and unusable until properly adopted). Florida recently suspended executions in response to a botched lethal injection, and numerous other states have suspended executions. *See* Laura Mansnerus, *Panel Seeks End To Death Penalty For*

New Jersey, N.Y. Times, Jan. 3, 2007, at A1. The Supreme Court's decision in *Hill v. McDonough,* 126 S.Ct. 2096 (2006), also suggests that lethal injection may well be cruel and unusual. While the *Hill* Court decided only the procedural question of when an inmate may raise a challenge to lethal injection, that procedural question would have been moot (indeed, not even certworthy) if a majority of the Supreme Court thought the petitioner's underlying lethal injection challenge was meritless.

CONCLUSION

For the reasons above stated, this Court should grant Bell's motion to expand the certificate of appealability and grant any other such relief as this Court may find necessary and proper.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 7, 2007

No. 06-22
7:04-cv-00752-jpj

EDWARD NATHANIEL BELL

Petitioner-Appellant

v.

LORETTA K. KELLY, Warden, Sussex I State Prison

Respondent-Appellee

ORDER

Appellant has filed a motion to expand the certificate of appealability issued by the district court and a motion for leave to file the motion in a form which exceeds the page limits established by Rule 27(d)(2) of the Federal Rules of Appellate Procedure. Appellee has filed a response in opposition to the motions, and appellant has filed a reply in support of the motions.

The Court grants appellant leave to file an oversized motion and accepts the motion for filing.

The Court denies appellant's motion to expand the certificate of appealability issued by the district court.

For the Court,

/s/ Patricia S. Connor
CLERK

REPLY BRIEF

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(3)

No. 07-1223

FILED
APR 1 - 2008
OFFICE OF THE CLERK
SUPREME COURT U.S.

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,

PETITIONER,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Capital Case – Execution Scheduled for April 8, 2008

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. RESPONDENT MISSTATES THE FACTS

Respondent's Statement of the Case contains many of the same errors that marred her brief below. Bell debunked these errors at Reply Brief of Petitioner-Appellant 3-13, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007) ("Pet. Reply"). The most egregious include:

Deficient Performance. Attempting to relitigate deficient performance, Respondent narrates trial counsel's ostensible reliance on Nellie Hutchinson-Walker, a prison conditions expert, and Dr. William Stejskal. Respondent's assertions are both irrelevant and wrong. Counsel could not have relied on Nellie Hutchinson-Walker, Opp. 7, because they first learned she existed on December 14, 2000, the same day they learned of her death. JA 1344, 1729, 1904, 1961. Counsel could not have relied on a prison conditions expert as a substitute for a mitigation investigation, Opp. 7, because they lost that motion months before trial. JA 60. And counsel could not have relied on Dr. Stejskal to conduct their mitigation investigation, Opp. 5-6, 11, because Dr. Stejskal told them at the outset that he would perform only a limited clinical evaluation, and was not "their one-stop shop" for mitigation services. JA 1379-80. Meeting with counsel shortly before trial, Dr. Stejskal was "surprised" to learn that his assistant "was the *only* one in the room who had had *any* substantive conversations with members of the family regarding Mr. Bell's background." JA 1344 (emphasis added). Shocked at counsel's lack of preparation, Dr. Stejskal's assistant "leap[t] into the breach and offer[ed] to assist," but trial counsel *never* followed up. JA 1344-48; 1729-30. Dr.

Stejskal never called Bell a "faker." *Compare* Opp. 11 *with* JA 1394. The district court, after observing Dr. Stejskal's demeanor, believed him. Pet. App. 173a-74a.

Carmeta Albarus. Respondent asserts that Albarus is unaccredited, Opp. 9-10, but she is licensed and certified. JA 1463-64. Respondent cites criticism of Albarus in *State v. DiFrisco*, 804 A.2d 507, 549-50 (N.J. 2002), *see* Opp. 10, but relies on the dissent in *DiFrisco* for a point rejected by the majority.

Domestic Violence, Infidelity, and Child Support. Respondent credits trial counsel with keeping the jury from hearing allegations of domestic violence. Opp. 10-12. Yet Billie Jo Swartz testified to domestic violence, JA 200-207, which the prosecutor emphasized in closing, JA 265, and the trial judge emphasized at sentencing, State JA 3080. Dawn Jones would have testified that the few "physical altercations" she had with Bell did not characterize their relationship, JA 1493, 1505-06, Tracy Nicholson would have "characterized their fights as 'pushing and pulling,'" JA 1726, and Joanne Nicholson would have testified that she never observed domestic violence. Pet. App. 172a. Respondent credits trial counsel with keeping the jury from hearing of Bell's infidelity, Opp. 7, but Swartz's testimony addressed that subject. JA 202-03. Respondent credits trial counsel with keeping the jury from learning of Bell's failure to pay child support, Opp. 7, but evidence adduced in federal district court demonstrated that, beyond the gifts he bought them, Bell did provide for his children within his means and did not violate any child support order. JA 1507-08, 1531-33, 1552, 1946.

II. THE WRIT SHOULD ISSUE TO RESOLVE A MATURE CIRCUIT CONFLICT REGARDING THE SCOPE OF 28 U.S.C. § 2254(d)

A. Bell Properly Preserved This Issue

Respondent claims "Bell did not make [this] argument below" until rehearing. Opp. 19. But Bell's opening brief in the Fourth Circuit expressly argued that "[o]n [the prejudice] issue, the district court was unhindered by the strictures of the AEDPA," citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003), and *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003). *See* Brief of Petitioner-Appellant 38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007) ("Pet. Br."). On reply, Bell argued that "[t]he admission of this [new] evidence on federal habeas defeats the Warden's claim that the district court should have applied § 2254(d) deference on the prejudice issue," citing *Monroe*. Pet. Reply 23 n.9.

B. New Evidence Was Uncovered On Federal Habeas

Respondent claims the "federal evidentiary hearing developed nothing that had not already been presented" to the state court. Opp. 20. But Respondent took the opposite stance before the district court—asserting that the new evidence Bell identified on federal habeas "demonstrates that Bell argued a different claim in the" Supreme Court of Virginia. Respondent's Mem. of Law Accompanying. Answer to and Mot. to Dismiss Petition 42, *Bell v. True*, No. 7:04CV752 (W.D. Va. filed June 16, 2005) ("Resp.'s MTD"). Respondent's new theory fails at every level.

Each of Bell's witnesses gave testimony unheard by the state court. Dawn Jones testified to at least four facts not included in her state affidavit: (1) Bell supported her while she was unable to work during her pregnancy, JA 1491-92, 1494, (2) their daughter Kydesha loves Bell and will be "devastated" if Bell is executed, JA 1495, 1503, (3) she never heard Bell speak badly of police officers, including Officer Timbrook, JA 1512, and (4) her relationship with Bell remained good despite occasional arguments and the incident she testified about in aggravation. JA 1493, 1497.

Barbara Bell Williams testified to at least four facts not included in her state affidavit: (1) Bell supported her, emotionally and financially, while she was in college, JA 1077, (2) she was shocked by the charges against Bell because they were so inconsistent with his character, JA 1078, 1554, (3) their daughter Kamille visited Bell in prison, loves him dearly, and would be traumatized by his execution, JA 1078, 1553-54, and (4) Bell had many friends who were police officers, and he ministered to the sick and elderly through police youth clubs. JA 1549.

Carol Anderson did not submit an affidavit on state habeas. On federal habeas, she testified to Bell's excellent behavior while they were roommates—he cooked and cleaned for her, escorted her home when she worked late, and never made any sexual advances toward her. JA 1080, 1565. Anderson was shocked by the charges against Bell and believed taking a life to be contrary to his character. JA 1080.

Joanne Nicholson testified to at least two facts not included in her state affidavit: (1) in addition to

being a good father to his biological children, Bell treated Tracy's oldest daughter, Alyse, as his own, JA 1518, and (2) she was unsure if she, Tracy, and the children could handle Bell's execution because they "just love him so much." JA 1524.

Testimony considered by the district court yet ignored by the Fourth Circuit contains additional new evidence. Precious Henderson did not submit an affidavit on state habeas, but testified on federal habeas that Bell was a good worker who went out of his way to help others. JA 1541. Carmeta Albarus testified that Bell was beaten repeatedly by his father, JA 1445-46, abuse Dr. Mark Cunningham further documented. JA 1195.

The performance of Bell's witnesses under cross-examination itself constitutes significant new evidence—because the so-called "cross-purpose" aspect of Bell's mitigation evidence consists of his witnesses' vulnerability on cross-examination. Pet. App. 15a-16a. The Supreme Court of Virginia refused an evidentiary hearing, and thus could not see how Bell's witnesses held up under cross-examination. The federal court granted a hearing, and found Bell's witnesses credible. *See* Pet. App. 169a-70a, 171a-73a.

C. The Circuits Are Deeply Divided

Respondent's assertion that "the 'conflict' identified by Bell simply does not exist," Opp. 21, is contrary to the conclusion of every court of appeals to consider this issue. The Eleventh Circuit recognized this circuit split in *LeCroy v. Secretary, Department of Florida Corrections*, 421 F.3d 1237, 1262-63 (11th Cir. 2005), *cert. denied*, 546 U.S. 1219 (2006). The Sixth Circuit acknowledges that its rule contradicts the Ninth Circuit's decision in *Killian v.*

Poole, 282 F.3d 1204 (9th Cir. 2002), *cert. denied*, 537 U.S. 1179 (2003). *See Johnson v. Luoma*, 425 F.3d 318, 324 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 58 (2006). And the Fifth and Seventh Circuits acknowledge that their rule contradicts the Tenth Circuit's decision in *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998). *See Valdez v. Cockrell*, 274 F.3d 941, 953 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005).

Respondent claims the Court did not reserve this question in *Holland v. Jackson*, 542 U.S. 649 (2004). Opp. 19. But *Holland* noted that "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer," and then "[a]ssum[ed], *arguendo*, that this analysis is correct." 542 U.S. at 653. Respondent is correct that *Holland* cited *Monroe*, 323 F.3d at 297-99 & n.19, as an example of a court applying *de novo* review. Opp. 20. Bell made the same argument below, Pet. Br. 38; Pet. Reply 23 n.9, but the Fourth Circuit nevertheless applied § 2254(d). Pet. App. 12a-13a. In the Fourth Circuit, therefore, *Brady* materiality now receives the benefit of *de novo* review when new evidence is admitted on federal habeas but, inexplicably, *Strickland* prejudice does not.

Contrary to Respondent's view, this circuit split is mature, well-defined, and recognized by multiple courts. There is no reason for this Court to await further percolation.

III. THE WRIT SHOULD ISSUE TO RESOLVE A CIRCUIT CONFLICT REGARDING THE RELEVANCE OF SO-CALLED "CROSS-PURPOSE" EVIDENCE

A. The Fourth Circuit Dismisses "Cross-Purpose" Evidence

Respondent does not deny that that the Fifth Circuit and the Supreme Court of Florida discount all mitigating evidence that may be labeled "double-edged" or "cross-purpose." *See* Pet. 23-24. But she argues that the Fourth Circuit takes a different path. According to Respondent, the Fourth Circuit merely considers that evidence is "cross-purpose" as part of a fact-specific weighing process. Opp. 22. The Fourth Circuit itself disagrees with that interpretation of its cases. In *Bowie v. Branker*, it explained that "mitigating evidence ... should be discounted, *under our precedent*" if "double-edged." 512 F.3d 112, 121 (4th Cir. 2008) (emphasis added).

Beyond *Bowie*'s characterization, the Fourth Circuit's holdings speak for themselves. Since this Court's landmark decision in *Williams v. Taylor*, 529 U.S. 362 (2000), *every* time the Fourth Circuit has found evidence to be "cross-purpose" or "double-edged," it has found counsel not ineffective.[1] And in

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[1] In addition to the examples cited in the Petition, see also *Emmett v. Kelly*, 474 F.3d 154, 170-71 (4th Cir.) (finding no prejudice from omission of evidence "comprised of at least as much bad evidence in aggravation as good evidence in mitigation"), *cert. denied*, 128 S. Ct. 1 (2007); *Lovitt v. True*, 403 F.3d 171, 181-82 (4th Cir.) (finding no prejudice based on failure to present "mixed" mitigating evidence), *cert. denied*, 546 U.S. 1152 (2005); *Moody v. Polk*, 408 F.3d 141, 152 (4th Cir. 2005) (disregarding a mitigating letter because it was "double-edged"), *cert. denied*, 546 U.S. 1108 (2006); *Howard v.*

this case, the *only* specific reason the Fourth Circuit gave for its finding of no prejudice was the ostensibly "cross-purpose" nature of Bell's evidence. *See* Pet. App. 16a. Where the Fourth Circuit's application of "[its] precedent" has led it *without variation* to the same result in even the most extreme cases, it is fairly viewed as applying a rule of law. If it walks like a duck, and quacks like a duck, odds are it's a duck.

B. Prejudice Is Apparent From Evidence Properly Received By The District Court

Respondent protests Bell's citation of pre-hearing reports and affidavits. Opp. 24. The district court, however, held that the evidentiary hearing "expand[ed] a pre-existing record," and that "all of the matters that have been previously filed are part of the record in this case." JA 1272-73. Respondent also invites this Court to enforce Virginia's hearsay rules, Opp. 24, but this Court rightly declined a similar invitation in *Wiggins v. Smith*. *See* 539 U.S. 510, 536 (2003) (evaluating prejudice in reliance on mitigation specialist's admittedly hearsay report and refusing to "make the state-law evidentiary findings that would have been at issue in sentencing"). Moreover, the district court rejected Respondent's

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Moore, 131 F.3d 399, 420-21 (4th Cir. 1997) (finding no prejudice for failure to investigate and present past prison records that were a "double-edged sword"), *cert. denied*, 525 U.S. 843 (1998); *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir.) (finding no prejudice where counsel failed to present mitigating evidence that also may have supported future dangerousness finding), *cert. denied*, 516 U.S. 972 (1995). In Respondent's own words, counsel in the Fourth Circuit "is not ineffective for failing to pursue evidence that is a 'two-edged sword.'" Resp.'s MTD 44.

objections to Albarus's live testimony, *e.g.*, JA 1444-45, 1449, 1451, 1453-55, Virginia courts have permitted Albarus to testify as a mitigation specialist, JA 1428, and under the streamlined procedures governing federal habeas, courts are free to receive hearsay evidence under 28 U.S.C. § 2246.

IV. THIS CASE SHOULD BE HELD PENDING BAZE V. REES, THEN VACATED AND REMANDED

A. This Court Has Jurisdiction To Vacate The Order Denying Bell A Certificate Of Appealability

Respondent's claim that Bell "does not ask this Court for review of the COA decision," Opp. 15, is simply wrong. The Petition acknowledged that "[t]he Fourth Circuit denied a Certificate of Appealability," and asked this Court to "grant the petition, vacate *the decision of the Fourth Circuit*, and remand for further proceedings not inconsistent with *Baze*." Pet. 34-35 (emphasis added). The decision in question is, of course, the decision to deny a certificate of appealability—a decision the Fourth Circuit made *before* this Court granted certiorari in *Baze v. Rees*, 128 S. Ct. 34 (2007). The Petition unambiguously asks this Court to vacate and remand *the decision of the Fourth Circuit*, to provide the Fourth Circuit an opportunity to consider Bell's lethal injection claim in light of *Baze*.[2] And this

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[2] Respondent is correct that Bell's lethal injection claim was presented on direct appeal, rather than state habeas. Opp. 4, 16-17. The Petition correctly stated the procedural history of this issue at 9-10, but misstated it at 33. Respondent's effort to attach substantive weight to this point, Opp. 16-17, however, fails. The district court did not find Bell's lethal injection claim

Court unquestionably has jurisdiction so to do. *Hohn v. United States*, 524 U.S. 236, 253 (1998).

Whether this Court should exercise that jurisdiction will necessarily turn on the outcome of *Baze*. The Petition does not argue that *Baze* renders the decisions of the courts below incorrect, Opp. 15-16, as this Court has not yet decided *Baze*. But this Court has previously stayed executions by lethal injection pending *Baze*, *e.g.*, *Callahan v. Allen*, 128 S. Ct. 1138 (2008), and it should do so again here.

B. The Supreme Court Of Virginia's Decision Did Not Rest On Independent And Adequate State Grounds

Virginia's rule, that a prisoner who declines to make a choice under Virginia Code § 53.1-234 has thereby chosen by default, is not an independent state ground under this Court's precedents. Where a state court's rule "depends on a federal constitutional ruling," the state rule "is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). In *Orbe v. Johnson*, 601 S.E.2d 543, 545-46 (Va. 2004), and *Orbe v. Johnson*, 601 S.E.2d 547, 549 (Va. 2004), the Supreme Court of Virginia based its choice-by-default rule directly on this Court's decision in *Stewart v. LaGrand*, 526 U.S. 115 (1999). Listing its prior decision in *Bell* as one of many in which it faced this issue, the court held that the circumstances of Virginia inmates "are legally indistinguishable from those presented to the United States Supreme Court in *LaGrand*." 601 S.E.2d at

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on federal habeas untimely or unexhausted. Pet. App. 162a-67a.

549; *see also* Opp. 18-19 (defending Virginia's rule as flowing from *LaGrand*). The state court's rule, therefore, "depends on a federal constitutional ruling," and, under *Ake*, does not preclude this Court's jurisdiction. 470 U.S. at 75.

Although Virginia's choice-by-default theory depends on *LaGrand*, it misreads that precedent. The defendant in *LaGrand* affirmatively "insisted" and "declar[ed]" his preference for execution by lethal gas over lethal injection. 526 U.S. at 119. This Court's only holding, thus, was that an inmate's *affirmative* selection of a method of execution waives his right to challenge the constitutionality of that method. *Id.* This Court did not have occasion to consider whether an inmate waives his right to challenge a method of execution he does not *affirmatively* select, but is instead defaulted to after refusing to choose. It is well-settled that the waiver of a constitutional right must be *voluntary* as well as knowing, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004), and the choice Respondent posits is anything but voluntary. This Court "'indulge[s] every reasonable presumption against waiver' of fundamental constitutional rights." *Zerbst*, 304 U.S. at 464 (citations omitted). Any doubt about the voluntariness of Bell's "choice" must be resolved against waiver. *Id.*

Under those precedents, this Court's decision in *Baze* may create a reasonable possibility that the Fourth Circuit would have granted a certificate of appealability. No other jurisdiction agrees with Virginia's choice-by-default interpretation of

LaGrand.[3] Indeed, the petitioner in *Baze* faced exactly the same choice as Bell. *See* Ky. Rev. Stat. Ann. § 431.220(a)-(b); *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007); *see also Nelson v. Campbell*, 541 U.S. 637, 640 (2004) (petitioner declined to elect and defaulted to lethal injection). Bell asks nothing more than that the Fourth Circuit be given the opportunity to consider his claim in light of *Baze*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

---

[3] Tellingly, Respondent can muster only one district court case to support her claim that "federal courts ... have held that a decision *not to choose* is a choice for lethal injection." Opp. 17 n.3.

Respectfully submitted,

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AMICUS CURIAE BRIEF

MOTION FILED
AUG 7 - 2008

(7)

No. 07-1223

IN THE
Supreme Court of the United States

EDWARD NATHANIEL BELL,
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v.

LORETTA K. KELLY, Warden, Sussex I State Prison,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FORMER STATE COURT JUDGES AND BRIEF OF *AMICI CURIAE* FORMER STATE COURT JUDGES IN SUPPORT OF PETITIONER

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RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici former state court judges respectfully move this Court to grant them leave to file the attached brief as *amici curiae* in the above-captioned case.

Pursuant to Rule 37.3 of the Rules of this Court, the *amici* sought written permission of all parties to file a brief as *amici curiae*. The consent of the attorney for Petitioner has been obtained. A letter attesting to Petitioner's consent has been submitted to the clerk of this Court. The consent of Respondent has been sought but has not been provided. Respondent stated that she would not provide

consent without first reviewing the brief. Because *amici* were unable to complete this brief with time to permit such a review, *amici* respectfully request leave to file the attached brief.

There is good cause for this Court to grant this motion. As described in the statement of interest in the attached brief, the *amici* present an important perspective in this case, as they are uniquely qualified to address the issues presented by federal review of state court decisions in the habeas corpus process.

The former state court judges represented have provided decades of service to a number of state courts throughout the country and have collectively served at every level of the state judiciary. They have held the highest positions in the state courts and served with great distinction. The experience of the *amici* with habeas litigation has provided each of them with valuable insight into the impact that this Court's decision will have on the principles of comity, federalism, and adequate process for criminal defendants.

Amici continue to be involved in educating legal professionals and improving the criminal justice system through a variety of means. The former state court judges represented in this brief hope that this brief will contribute to the advancement of the habeas corpus process.

Respectfully submitted,

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QUESTION PRESENTED

This brief will address the following question on certiorari:

Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

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BRIEF OF *AMICI CURIAE* FORMER STATE COURT JUDGES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are former state court judges who have collectively served at all levels of the state judiciary. *Amici*'s views are based on decades of service to state courts throughout the United States. *Amici* are uniquely qualified to address the manner in which state court decisions are reviewed by federal courts, and the impact that this decision will have on the principles of comity, federalism, and due process.

Amici have been intimately involved in the habeas corpus process, both as members of the judiciary and as practicing attorneys. They have experienced federal review of their decisions, both affirming and reversing, and as a result, have thought critically about the habeas process and the interests affected by it. *Amici* now serve as scholars, educators, and practitioners in various capacities and continue to consider these important issues. *Amici* respectfully submit this brief in an effort to

[1] Pursuant to Rule 37.6, *amici curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner has consented to the filing of this brief and the consent accompanies the brief. Counsel for Respondent has withheld its consent, and, accordingly, *amici* have filed a motion for leave to file this brief. *See* S. Ct. Rule 37.3.

provide insight on how members of the state judiciary interpret these statutes and the impact that this Court's decision will have on the critical principles of comity, federalism, and due process.

The Honorable Fred L. Banks, Jr. is a former Presiding Justice of the Mississippi Supreme Court, where he served for eleven years. Prior to that, Justice Banks served as a circuit judge for six years. He was also a member of the Mississippi House of Representatives, where he served as Chair of the Ethics Committee, the Judiciary Committee, and the Legislative Black Caucus.

The Honorable William M. Bowen, Jr. served on the Alabama Court of Criminal Appeals for eighteen years. At the time of his retirement he had written more published opinions than any other appellate judge in the history of the State of Alabama. He has also served as the Chair of the Alabama Supreme Court's Advisory Committee on Rules of Criminal Procedure.

The Honorable James G. Exum, Jr. served on the North Carolina Supreme Court for twenty years, eight as Chief Justice and twelve as Associate Justice. During his career on the Supreme Court, Justice Exum authored more than 600 opinions. Justice Exum also served as a Superior Court Judge, a member of the North Carolina legislature, and an instructor at Duke University School of Law and University of North Carolina at Chapel Hill School of Law. Justice Exum is currently Jurist in Residence at the Elon University School of Law.

The Honorable Norman S. Fletcher served on the Georgia Supreme Court for fifteen years, four as the Chief Justice and six as the Presiding Justice. He has also served as the Chair for the Judicial Counsel of Georgia and sat on the Board of Directors of the Conference of Chief Justices.

The Honorable Janine P. Geske served on the Wisconsin Supreme Court for five years and in the Milwaukee County Circuit Court for twelve years. She currently serves as a Distinguished Professor of Law at Marquette University Law School.

The Honorable Howard A. Levine served as an Associate Judge on the New York State Court of Appeals for ten years. Prior to that, Judge Levine served eleven years as an Associate Justice on the Supreme Court Appellate Division, Third Department. He has also served as the Chair of the New York Federal-State Judicial Council.

The Honorable Morris Overstreet served on the Texas Criminal Court of Appeals for seven years and as the Presiding Judge in Amarillo County for three years. He has also served as a Professor at the Texas Southern University Thurgood Marshall School of Law.

The Honorable James L. Robertson served as a Justice on the Mississippi Supreme Court for ten years. He has also served as a Professor at the University of Mississippi School of Law for fifteen years and has authored a number of publications.

The Honorable Alexander M. Sanders, Jr. served as the Chief Justice of the South Carolina Court of Appeals for eight years. Justice Sanders served in both the South Carolina House of Representatives and Senate and was a nominee for the United States Senate. He has also served as the President of the College of Charleston and the Charleston School of Law.

The Honorable Robert F. Utter served on the Supreme Court of Washington for twenty-four years, two of which as Chief Justice. Justice Utter was a Professor at Seattle University School of Law for eight years, where he taught state constitutional law. He has also served as the Chair of the Board of Directors of the American Judicature Society.

The Honorable Penny J. White served as a judge in every court of record in the state of Tennessee, serving as a trial judge for two years, as a judge on the intermediate Court of Criminal Appeals for two years, and as a Justice on the Tennessee Supreme Court for two years. Justice White is currently a Professor at the University of Tennessee College of Law and she authored the Tennessee Rules for Post-Conviction Relief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The holding of the Fourth Circuit Court of Appeals, applying 28 U.S.C. § 2254(d) to Petitioner Edward Bell's ineffective assistance of counsel claim, should be reversed. The court's application of § 2254(d) to a claim that was never reviewed by the state court, despite Petitioner's diligence, is a misapplication of law and is in conflict with this Court's precedent. Affirming the Fourth Circuit's decision would result in inadequate review of Bell's claim at every level, both state and federal, and prevent him from receiving a basic level of process.

Instead, this Court's decision in *Michael Williams v. Taylor*, 529 U.S. 420 (2000), and its analysis of § 2254(e), provides the correct framework for federal review of claims that have gone unreviewed by state courts through no fault of the petitioner. The analysis applied in *Michael Williams* compels the conclusion that if federal courts can properly receive new claims that were not reviewed by the state courts, they must also be able to review the merits of such claims. To hold otherwise would result in potentially meritorious claims being denied without de novo review by any court, state or federal.

Allowing federal courts to review these claims de novo promotes the principles of comity and federalism that underlie the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Under § 2254(e) petitioners will receive adequate process on potentially meritorious claims, while protecting the

balance between state and federal courts in habeas proceedings. Section 2254(e) is the proper framework for the instant analysis, and this Court should reverse the decision of the Fourth Circuit Court of Appeals.

ARGUMENT

I. CLAIMS THAT ARE NOT REVIEWED BY THE STATE COURT, DESPITE PETITIONER'S DILIGENCE, SHOULD BE REVIEWED DE NOVO BY FEDERAL COURTS

Petitioner Edward Bell's ineffective assistance of counsel claim is properly reviewed under 28 U.S.C. § 2254(e). Section 2254(e) provides the framework for analyzing claims that, despite petitioners' diligence, have not been reviewed at the state level. By applying § 2254(d) to Bell's claim, the Fourth Circuit improperly limited its review of a claim that, despite Petitioner's undisputed diligence (Petition Appx. 84(a)), has never been properly reviewed. The Fourth Circuit's application of § 2254(d) is inconsistent with the plain language of the statute, and as this Court's holding in *Michael Williams v. Taylor* makes clear, there is no comity or federalism-based reason to distort the statutory language in such a way.

In *Michael Williams*, the Fourth Circuit similarly rejected a petitioner's previously unreviewed claims under § 2254(d). 529 U.S. at 428. This Court granted certiorari to determine whether Michael Williams was entitled to an evidentiary hearing on his claims under § 2254(e). The unanimous decision

in *Michael Williams* reflects the proper application of §2254(e) to such facts, and is equally appropriate in this case.

The opening clause of § 2254(e)(2) provides the standard for determining whether a federal court can hold an evidentiary hearing for habeas claims: "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold a proceeding." As this Court recognized, the phrase "failed to develop" does not embody a no-fault standard, but instead requires an analysis of the petitioner's diligence in state court. *Id.* at 431-32 (finding that if Congress had intended to create a no-fault standard, it would not have been difficult to make its intention clear); *see also Morris v. Dretke*, 313 F.3d 484, 501 (5th Cir. 2005) (Higginbotham, J. concurring) ("Limiting a federal court's review to the record before the state habeas court would undermine the Court's intention in *Williams* of providing state habeas petitioners who did not 'fail' to develop their claims with a vehicle to do so at the federal level.").

It is thus plain that the phrase "failed to develop" in this context should not be read narrowly to bar evidentiary hearings for diligent petitioners with meritorious claims. *Michael Williams*, 529 U.S. at 434. The petitioner is "not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." *Id.* at 432. Fault in that instance rests with "the person who interfered with the accomplishment of the act or with no one at all." *Id.*

It follows that if federal courts are permitted in this instance to conduct evidentiary hearings and receive new evidence, they must also be able to review that evidence. To hold otherwise would prevent potentially meritorious claims from receiving de novo review by any court. Such a conclusion would be inconsistent with the principles of federal habeas review and would substantially interfere with the duty of federal courts in the process. *See Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (federal courts have a "solemn duty to make independent inquiry and determination of [any] disputed facts").[2]

As Petitioner has plainly demonstrated here, the admission of new evidence on habeas gives rise to a new claim that the state court has not previously adjudicated on the merits, and thus, the Petitioner's claim is properly reviewed de novo under § 2254(e) not § 2254(d).[3] Accordingly, the Fourth Circuit's application of § 2254(d) to Bell's ineffective assistance of counsel claim is contrary to the plain language of the statute, and as this Court's holding in *Michael Williams* makes clear, there is no federalism or comity-based reason to distort the

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[2] *See also Gallegos v. Nebraska*, 342 U.S. 55, 61 (1951) (the duty of federal courts "requires [those judges] to examine, in cases before [them] such facts as form the basis of a state court's denial of that right"); *Truax v. Corrigan*, 257 U.S. 312, 324-25 (1921) ("[T]his court must analyze the facts as averred and draw its own inferences as to their ultimate effect.").

[3] *See Barkell v. Crouse*, 468 F.3d 684, 695 (10th Cir. 2006) (finding "a state court would have no occasion to determine whether the defendant has satisfied the § 2254(e)(2) requirements for a federal evidentiary hearing, so we have no state adjudication on the matter to which we could defer").

statutory language to reach the Fourth Circuit's result.

II. PETITIONER'S INTERPRETATION OF §§ 2254(D) AND (E) PROMOTES THE PRINCIPLES OF COMITY AND FEDERALISM THAT UNDERLIE AEDPA AND WILL ENSURE THAT PETITIONERS RECEIVE ADEQUATE PROCESS

A. Because State Courts Have Not Reviewed These Claims And Rendered A Decision, Principles Of Comity And Federalism Will Be Protected And Promoted

The principles of comity and federalism embodied in AEDPA are predicated on an initial state court adjudication of the claim. As this Court has noted, these principles are implicated most strongly "where a federal court makes its determination on the identical record that was considered by the state appellate court." *Sumner v. Mata*, 449 U.S. 539, 547 (1981). This is not the case here, however. As this Court suggested in *Holland v. Jackson*, 542 U.S. 649, 653 (2004), "[w]here new evidence is admitted" during federal habeas, "there is no relevant state-court determination to which one could defer." Because there is no state court determination of Bell's ineffective assistance of counsel claim, the state court determination below is not relevant to the analysis of Bell's claim. Allowing de novo review by the federal court will protect and promote the principles of comity and federalism.

As this Court noted, "[c]omity . . . dictates that when a prisoner alleges that his continued confinement for a state conviction violates federal law, the state courts should have the *opportunity* to review this claim and provide necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (emphasis added). Federal courts have repeatedly recognized that the prerogatives of state courts are respected when they are given the opportunity to adjudicate a claim, regardless of whether they take the opportunity or not.[4]

State courts will still have the first opportunity to review these claims because § 2254(e) requires that petitioners diligently pursue their claims in state court. As this Court recognized, "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort." *Michael Williams*, 529 U.S. at 437. Additionally, in practical

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[4] *See, e.g., Pike v. Guarino*, 492 F.3d 61, 74 (1st Cir. 2007) ("Whatever the extent of the state court's opportunity to adjudicate the competence claim . . . the court did evaluate the factual basis upon which the competence claim is premised . . . [and] it is difficult to imagine how the interests of comity will be disserved by permitting a federal court to resolve the competence claim on its merits."); *Clinkscale v. Carter*, 375 F.3d 430, 441 (6th Cir. 2004) ("[E]ven if the Ohio Court of Appeals . . . refused to address the merits . . . that would not bar federal court review. Those concerns are satisfied here because the Ohio Courts were given a full and fair opportunity to adjudicate and grant relief."); *Hardcastle v. Horn*, 368 F.3d 246, 261 (3d Cir. 2004) ("There is no requirement, however, that they be given more than one opportunity to adjudicate these claims.").

terms, § 2254(e) provides a check on petitioners and will prevent them from sandbagging or withholding potentially meritorious claims until federal habeas proceedings. Moreover, the application of § 2254(e) to these facts will promote the interests of the state courts in resolving all claims raised. As courts have recognized, the diligence requirement is carefully reviewed to encourage proper presentment of issues in state court.[5]

Nor will the application of § 2254(e) interfere with the principles of federalism that underlie AEDPA. As the legislative history of AEDPA demonstrates, the purpose of § 2254(d) was to prevent endless second-guessing of state court judgments. *See* 141 Cong. Rec. 15,023 (1995) (statement of Sen. Hatch). That is hardly the case here, however, as the question before the federal court is an entirely new claim that the state court did not review.

Moreover, allowing federal courts to engage in a review of these claims on the merits is consistent with the co-equal nature of state and federal courts in habeas proceedings. State and federal courts are, "[b]y tradition . . . coordinate equals operating in a single judicial system." *See* Larry W. Yackle, *State*

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[5] *See Monroe v. Angelone*, 323 F.3d 286, 299 n.19 (4th Cir. 2003) ("[I]t may be suggested that we are encouraging defendants to make a less-than-vigorous effort to uncover *Brady* material during state proceedings. However, AEDPA guards against any strategic decision to wait to search for *Brady* material: a federal habeas petitioner may only secure an evidentiary hearing if he has been fully diligent in state court.").

Convicts and Federal Courts: Reopening the Habeas Corpus Debate, 91 CORNELL L. REV. 541, 554 (2006); *see also* Guido Calabresi, Madison Lecture, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1303-07 (2003) (discussing the evolution of judicial roles).

This balance is firmly reflected in 28 U.S.C. §§ 2246 and 2247, as well as the Rules Governing Habeas Corpus, which allow federal courts to, at times, expand the record. *See* 28 U.S.C. § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit"); Rule 7(a) of the Rules Governing Section 2254 ("the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition"). The expansion of the record under the Rules Governing Habeas Corpus can include, "without limitation, letters predating the filing of the petition in the district court, documents exhibits, and answers under oath, if so directed to written interrogatories propounded by the judge." *See* Rule 7(b) of the Rules Governing Section 2254.

This clearly articulated authority to inquire into the facts of a habeas petitioner's case necessarily carries the concomitant authority to use the facts uncovered. Section 2254(d) must be read against this background, and so read, cannot contemplate a federal court blindly deferring to a state court's judgment where the facts, and hence the legal claim, have sufficiently changed. Petitioner's interpretation

is consistent with, and indeed promotes, the principles of comity and federalism that underlie the habeas process.

B. Allowing Federal Courts To Conduct De Novo Review Of Claims That Were Not Reviewed By The State Courts Will Ensure Adequate Process For Petitioners

Allowing federal courts to review new claims on the merits will ensure that diligent petitioners are not denied adequate process by forces beyond their control. As this Court has recognized, there are barriers that can prevent petitioners from receiving adequate process through no fault of their own.[6] State courts have similarly recognized and voiced opposition to procedural obstacles that act as a barrier to petitioners' gaining adequate process in federal proceedings.[7] This Court has long recognized that, while states are free to shape their own procedures, such procedures cannot defeat the assertion of federal rights. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes [sic] the State may set for those who are endeavoring to

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[6] *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (discussing the inadequacy of counsel in preparing a mitigation case on behalf of the defendant in the sentencing phase).

[7] *See Evans v. State*, 441 So.2d 520, 531 (Miss. 1983) (Robertson, J., dissenting) ("The State's articulated motivation is to short-circuit anticipated federal court review via habeas corpus under § 2254. The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case.").

assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the same name of local practice.").[8]

This Court's jurisprudence has repeatedly recognized the duty of federal courts to review claims that state courts have not properly addressed.[9] As Justice Holmes wrote, "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes from outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *See Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). This Court's holding in *Townsend v. Sain*, 372 U.S. 293, 313 (1963), makes clear that a federal habeas court must grant an evidentiary hearing where the petitioner has pled facts that, if true, would entitle

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[8] *See also Lee v. Kemma*, 534 U.S. 362, 376 (2002); *Osborne v. Ohio*, 495 U.S. 103, 125 (1990); *Felder v. Casey*, 487 U.S. 131, 152 (1988); *James v. Kentucky*, 466 U.S. 341, 349 (1984); *Brown v. W. Railway of Alabama*, 338 U.S. 294, 298-99 (1949).

[9] *See McNeal v. Culver*, 365 U.S. 109, 117 (1961) (finding that upon pleading allegations that, if true, establish a constitutional violation, court may not reject those allegations without granting a hearing); *see also Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (reversing state court judgment on direct appeal where "record shows that petitioner was not permitted to offer evidence in support of his claim); *Carter v. Texas*, 177 U.S. 442, 448-49 (1900) (reversing state court on direct appeal where issue decided on a motion that "was but a mere tender of the issue, unaccompanied by any supporting testimony" and defendant "offered to introduce witnesses, to prove the allegations" but "the court . . . declined to hear any evidence upon the subject").

him to relief and "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." As this Court has recognized, the passage of AEDPA did not change this "basic" rule. *See Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007).

The drafters of AEDPA acknowledged the need to protect these meritorious claims, while limiting frivolous or meritless appeals. *See* 141 Cong. Rec. 14,527 (1995) (statement of Sen. Hatch) (AEDPA would prevent individuals from "abusing our judicial system, and delaying the imposition of a just sentence, by filing appeal after meritless appeal; frivolous appeal after frivolous appeal"); 142 Cong. Rec. 7801 (1996) (statement of Sen. Dole) ("We are about to curb these endless, frivolous appeals"). The Congressional purpose to curb frivolous appeals is not implicated where a petitioner has diligently sought to develop the factual basis of a claim, has been denied the opportunity in state court, and has been properly provided an evidentiary hearing in federal court at which evidence establishes that his claim is meritorious. Indeed, as Senator Thurmond made clear, Congress always intended to "reduce the filing of repetitive habeas corpus petitions" but "without unduly limiting the right of access to the federal courts." 141 Cong. Rec. 14,533 (1995) (statement of Sen. Thurmond).

Federal review is a vital part of protecting the rights of petitioners. *See* 141 Cong. Rec. 14,526 (1995) (statement of Sen. Hatch) (stating "[t]here will be a full right of appeal all the way up the Federal

courts, from Federal court to district court [sic] to the Supreme Court of the United States, and their rights will be protected"). The Fourth Circuit's decision denies the "full and fair review" Congress intended in passing AEDPA by improperly applying the heightened standard of § 2254(d), as opposed to § 2254(e), to previously unreviewed claims.

CONCLUSION

Amici curiae former state court judges respectfully submit that the decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-1223

IN THE

Supreme Court of the United States

EDWARD NATHANIEL BELL,
Petitioner,

v.

LORETTA K. KELLY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File Brief and Brief for the National Association of Federal Defenders, and the National Association of Criminal Defense Lawyers as *Amici Curiae* Supporting Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

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On Writ of Certiorari to the
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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The National Association of Federal Defenders (NAFD) and The National Association of Criminal Defense Lawyers (NACDL) respectfully move this Court to grant them leave to file the attached brief as *amici curiae* in the above captioned case.

Pursuant to Rule 37.2 of the Rules of this Court, the NAFD and the NACDL sought written

permission of all parties to file a brief as *amici curiae*. The consent of the attorney for Petitioner has been obtained. A letter attesting to their consent has been submitted to the clerk of this Court. The consent of the Respondents has been sought but has not been provided. Respondents stated in writing that they would not provide consent for the brief unless they were given an opportunity to review the brief in advance of the filing deadline. Specifically, Respondents noted that they "do not consent to matters [they] have not had an opportunity to review." Because the NAFD and the NACDL were unable to complete a draft of the brief in time to permit such a review, the NAFD and the NACDL respectfully request leave to file the attached brief.

There is good cause for this Court to grant this motion. As described in the statement of identity of interest in the attached *amicus curiae* brief, the NAFD and the NACDL are respected national organizations with significant membership across the country, and their interests in this case are substantial.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal

Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

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McDaniel, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

The attached brief does not replicate the arguments persuasively advanced in Petitioner's brief. Instead, the NAFD and the NACDL provide the perspective of two prominent national defense organizations regarding the importance of reliability and procedural fairness in post-conviction proceedings, and the need for clarity as to a distinct question of interpretation relating to 28 U.S.C. § 2254.

The membership of the NAFD and the NACDL are concerned about the due process implications of the Fourth Circuit's decision. The NAFD and the NACDL have worked hard to ensure that the administration of justice is reliable and fair by advocating at all levels of government for procedural fairness in the adjudication of federal rights. The NAFD and the NACDL are in a unique position to outline for this Court the need for clarification as to the level of process necessary in order to trigger the limitations on relief announced in § 2254(d)(1).

Respectfully submitted,

Andrea Lyon
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Attorneys for Amici Curiae

August 7, 2008

CAPITAL CASE

QUESTIONS PRESENTED

Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

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28 U.S.C. § 2254(d)(1) (1994) ..... passim

28 U.S.C. § 2254(d)(2) (1994) ..... passim

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28 U.S.C. § 2254(d)(7) (1994) 24

28 U.S.C. § 2261 35

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137 Cong. Rec. H7996 (daily ed. Oct. 17, 1991 18

137 Cong. Rec. H8001 (daily ed. Oct. 17, 1991) 17

137 Cong. Rec. H8003 (daily ed. Oct. 17, 1991) 17

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Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008 22

Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. UNIV. L.Q. 1679, 1687 (2005) 14

1 HERTZ & LIEBMAN § 20.2c 8

Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) 10, 20

Justin F. Marceau, *Deference and Doubt, the Interaction of AEDPA § 2254(d)(2)and (e)(1)*, 82 TUL. L. REV. 385 (2007) 9, 14, 16, 20

2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:12 at 101-02 (rev. 6th ed. 2000) 12

Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L. J. 283, 302 (2004) 15

Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, Federal Practice and Procedure § 4265.2 (2007) 13

Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*,

44 BUFF. L. REV. 381 (1996)..... 12, 15, 16

This *amici curiae* brief is submitted in support of petitioners.

INTEREST OF *AMICI CURIAE*[1]

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and

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[1]Pursuant to Rule 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part; that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. While counsel for Petitioner has consented to the filing of this brief, which consent accompanies the brief, counsel for respondent has withheld its consent. *Amici Curiae* have filed a motion for leave to file this brief at the beginning of the brief. *See* S. Ct. Rule 37.3.

the federal courts of appeals.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

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Amici file this brief because the case squarely presents the Court with an opportunity to address the relationship between minimal procedural fairness and the comity and federalism

concerns embodied by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Although amici endorse in full the approach presented in the Opening Brief, Amici's longstanding commitment to the fair administration of justice compels them to urge this Court to also, or in the alternative, address the relationship between procedural fairness and the limitations on relief announced in § 2254(d)(1). The way in which the Court decides this case will influence whether state post-conviction courts believe they are required to provide a minimally fair process in order for their decisions to be steeled from federal review by the provisions of the AEDPA.

Amici believe that core principles of due process and the legislative purpose behind the AEDPA are undermined when state adjudications that are not full and fair nonetheless enjoy deference. Because this case presents a stark example of procedural unfairness, Amici believe that the Court should take the opportunity offered by this case to emphasize that there is a *quid pro quo* relationship between fair procedures and the limitations on relief announced in § 2254(d)(1).

STATEMENT OF FACTS

Amici adopt the statement of facts in Petitioner's opening brief. Amici are, however, particularly interested in the undisputed procedural unfairness that characterized the state court's review of Petitioner's Sixth Amendment claim.

There is no dispute that Petitioner diligently pursued in state court the Sixth Amendment claim now before this Court. Unfortunately, the process afforded Petitioner was insufficient to allow a meaningful review of the claim. Petitioner's entire habeas petition was dismissed by the Virginia Supreme Court in an opinion signed only by a deputy clerk for the court, which contains no indication as to which justices, if any, participated in the decision. Pet. App. 231a-261a. The clerk's order, which serves as the first and only review of the Sixth Amendment claim at issue in this case, denied Petitioner an evidentiary hearing, discovery, experts, and an opportunity to supplement the habeas petition. *Id.* In light of the colorable allegations of Sixth Amendment harm presented to the state court, the refusal to extend minimal discovery or funding, or provide a hearing was, according to the federal courts that have reviewed this claim, procedurally improper.

The level of process due to a Petitioner necessarily varies based on the nature of the claim at issue (for example, whether the claim is record-based or requires evidentiary development beyond the record). It is not disputed that Petitioner's allegation of ineffective assistance of counsel at the sentencing phase of the trial, taken as true, would entitle him to relief. Nor is there any serious contention that this question could be resolved through briefing alone, without discovery, a hearing, or even an opportunity to supplement the record. Because Petitioner has stated a colorable claim as to a non-record-based claim, the district

court expressly found that the process afforded to Petitioner regarding this claim "was not adequate to afford a full and fair hearing." Pet. App 84a. The Warden has never challenged this finding. On this record, Petitioner did not receive a "full and fair" review in state court.

SUMMARY OF ARGUMENT

The opening brief and this brief set out compatible but alternative approaches in support of a single conclusion: the limitations provided in § 2254(d)(1) are not applicable in this case. The opening brief explains that neither of the limitations provided in § 2254(d) – (d)(1) or (d)(2) – apply when there has not been an adjudication on the meritsin question. Amici fully endorse this understanding. Amici write separately, however, in order to explain that there is an alternative analytic path to the conclusion that (d)(1) does not apply in this case.

Specifically, this brief addresses an alternative threshold question regarding AEDPA's application: do § 2254 and the Constitution contemplate an application of (d)(1)'s extremely deferential review of a state adjudication when the state review of the claim was procedurally unreasonable and deficient? Both sound principles of statutory interpretation as well as due process compel the conclusion that the Fourth Circuit erred by applying the limitations prescribed by 28 U.S.C. § 2254(d)(1) to Petitioner's federal habeas petition. The Fourth Circuit erred in holding that (d)(1)

applies even when the only state review of the constitutional claim at issue is so lacking in procedural fairness as to contravene AEDPA, its legislative history and basic expectations of procedural due process.

ARGUMENT

Amici submit that due process and § 2254 itself dictate that the absence of a "full and fair" review of Petitioner's ineffective assistance of counsel claim compels the conclusion that § 2254(d)(1), which bars habeas relief absent a ruling contrary to or unreasonably applying clearly established Federal law, does not apply to this claim.

Section 2254 contains two alternative limitations on federal habeas relief, the substantive limits announced in § 2254(d)(1), and the procedural or fact-finding limitations prescribed in § 2254(d)(2). As Chief Judge Alex Kozinski has observed, the limitations on relief announced in § 2254(d)(2) are satisfied where, as here, the state court's "fact-finding process itself is defective." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). Judge Kozinski's reading of the statute is consistent with the legislative history of the AEDPA, and compelled by due process, *Infra* Sections I and II.

Accordingly, amici argue that because there is no dispute that Petitioner was deprived of a full and fair review, the limitations announced in (d)(2) have been satisfied and the alternative limitations

contained in (d)(1) do not apply. *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008) (en banc) (recognizing that satisfying § 2254(d)(2) necessitates the conclusion that (d)(1)'s limitations are not a barrier to habeas relief).

I. BECAUSE THE STATE COURT'S ADJUDICATION WAS PROCEDURALLY UNREASONABLE, PETITIONER HAS SATISFIED THE STRICTURES OF § 2254(D)(2) AND PETITIONER IS ENTITLED TO A *DE* NOVO REVIEW OF HIS CONSTITUTIONAL CLAIMS.

Because due process and the legislative history of § 2254(d) independently require that Petitioner receive a procedurally fair and full review of his federal claims, *infra* I(b), II, and because the district court found, without objection, that the State of Virginia failed to provide Petitioner with such an opportunity in this case, Petitioner is entitled to a full and fair review of his claims in federal court. More to the point, the review of the claim at issue must not be encumbered and constrained by findings and conclusions that are the product of a procedurally inadequate state court process. It is imperative that § 2254 be read in a manner that precludes the application of the deference required by § 2254(d)(1) in this case. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (noting that the Court is obligated to construe statutes so as to avoid constitutional problems if it can do so).

A. Section 2254(d)(2) Provides an Appropriate Vehicle For Realizing The Statutory Purpose and Due Process Rights That Require Minimal Procedural Fairness

One reading of § 2254(d) that is faithful to the text and history of the statute, and that alleviates tension with the procedural requirements of due process is the interpretive approach announced by Chief Judge Kozinski of the Ninth Circuit. Reading § 2254 in manner that is "faithful to the text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy," Judge Kozinski explained that a finding of fact is "unreasonable" for purposes of § 2254(d)(2) where, as here, "the process employed by the state court is defective." *Taylor*, 366 F.3d at 999.[2] Under this reading of the statute, when a state court makes evidentiary findings without providing the Petitioner an opportunity to fully and fairly litigate his claim, "such findings clearly result in an unreasonable determination of the facts." *Id.* at 1001; *see also* 1 HERTZ & LIEBMAN § 20.2c (concluding that § 2254(d)(2)'s reasonableness standard applies to both the process and the substance of state court factfindings); *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) (holding that the absence of a

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[2]Judge Tallman, also of the Ninth Circuit, has echoed this analysis. *Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005).

"full, fair, and adequate" proceeding in state court dictates that deference would be inappropriate).[3]

Assuming the Court approves Judge Kozinski's reading of § 2254(d)(2), thereby addressing the constitutional and statutory interpretation concerns raised by amici, the Fourth Circuit's application of (d)(1) in this case was in error. If the reasonableness inquiry under (d)(2) invites a review of the procedural adequacy of the state court's decision, then the constitutional and interpretative problems associated with deferring to a proceeding that was not "full and fair" fall away. Stated more succinctly, where a Petitioner satisfies either of the gateway limitations on relief announced in § 2254, the federal court's review of the relevant claim is *de novo*. 28 U.S.C. § 2254(d) (barring habeas relief unless either (d)(1) or (d)(2) is satisfied).

Accordingly, just as a state court's adjudication of a claim that is "contrary to" clearly established law satisfies (d)(1) and warrants *de novo* review, if a state court's unreasonable process as to a claim – i.e., not "full and fair" – satisfies (d)(2), then the federal court's review of the claim would be *de novo*. *See, e.g., Carlson*, 526 F.3d at

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[3] This Court has never addressed the question as to the interaction of AEDPA's two provisions addressing the factual deference owed to state court findings of fact, § 2254 (d)(2) & (e)(1). *See Rice v. Collins*, 546 U.S. 333, 338-339 (2006) (leaving unanswered the question of "whether and when" (e)(1) applies); *see also Teti v. Bender*, 507 F.3d 50, 58 (1st Cir. 2007); Marceau, 82 TUL. L. REV. 385 (surveying the confusion among circuits).

1024 (holding that because the limits announced in (d)(2) were satisfied, 'the substantive merits of Carlson's claim are analyzed under the pre-AEDPA standard - that is, *de novo*."); *Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006); *Jones v. Walker*, 496 F.3d 1216 (11th Cir. 2007). Because the state court's adjudication of the factual questions in this case was unreasonable for purposes of § 2254(d)(2), Petitioner is entitled to a *de novo* review of his constitutional claims. Pet. App. 84a.

B. Section 2254 Dictates that States are Required to Provide a Procedurally "Full and Fair" Review of All Claims Arising Under the Federal Constitution.

The history of § 2254, particularly considering the Writ's historical relationship with due process, strongly suggests that the congressional intent to provide considerable deference to state court proceedings only extended to state court proceedings that were procedurally fair. The legislative history of § 2254 is confusing and contradictory as to several of the statute's key provisions. *See, e.g.*, Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (surveying the textual indeterminacy of the provisions). But as to the question of procedural fairness in the state court, the structure and legislative history of § 2254 are uniquely instructive; the structure and history of § 2254, particularly in light of the well-settled expectation that state courts must provide a procedurally full and fair process, *infra* II, affirms

the notion that "[o]ur legal regime []ensures correctness by proxy of reliable procedure." *Id.* at 454; *see also*, 141 Cong. Rec. S7836 (statement of Sen. Kyl) (recognizing that federal courts must retain the right to ensure that state procedures are "adequate and effective").

Prior to the enactment of the AEDPA, § 2254 deference to state court conclusions was expressly conditioned on the prisoner's receipt of a "full and fair" process in state court. 28 U.S.C. § 2254(d)(1) & (6) (1994). At least one Circuit Court has concluded that the omission of the "full and fair" language from the current version § 2254 provides a "clear" signal that Congress intended all of the limitations in § 2254 to apply regardless of whether the state court review of the federal claims was procedurally fair. *Valdez v. Cockrell*, 274 F.3d 941, 951 n. 17 (5th Cir. 2001) (rejecting invitation to limit deference to procedurally unfair conclusions of law and findings of fact). This conclusion is inconsistent with well-established rules of statutory interpretation and the legislative history preceding the enactment of the AEDPA.

1. Omission of the Words "Full and Fair" from § 2254, Without More, Does Not Abridge the Longstanding Tradition of Procedural Fairness.

Even if this Court rejects the premise that procedural due process requires procedural regularity and fairness in the state post-conviction

prcoess, it is beyond peradventure that the expectation of adequate procedures or corrective processes had become a long-established principle of federal habeas law by 1996. *See, e.g., Stone v. Powell*, 428 U.S. 465, 482 (1976) (invoking "full and fair" as a restriction on the Court's otherwise complete abandonment of federal habeas review under the Fourth Amendment); *Townsend v. Sain*, 372 U.S. 293, 312-314 (1963); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

As such, the omission of the "full and fair" language cannot, without more, be construed as an affirmative repudiation of a basic requirement of procedural fairness. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:12 at 101-02 (rev. 6th ed. 2000). Courts may not infer that a legislative enactment is "intend[ed] to overthrow long-established principles of law unless that intention is made clear, through appearing either by express declaration or by necessary implication." *Id.* That is to say, even if the requirement of a "full and fair" review does not enjoy constitutional force, the expectation that conclusions derived from procedurally unfair proceedings are not entitled to deference is readily supported by the canons of statutory interpretation.[4]

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[4] The expectation of "full and fair" processes created by case law must continue to govern unless AEDPA explicitly rejects such a rule. After all, AEDPA does not displace the whole of habeas law, but rather functions by treating the "preexisting habeas landscape as its baseline." Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

Notably, the requirement of fairness as a precondition to deference is not the only procedural omission in the current version of § 2254. The previous version of § 2254 contained a series of procedural requirements that were systematically omitted from the current version. Specifically, the prior version required that the state court provide "written finding[s]" or other "adequate written indicia." 28 U.S.C. § 2254(d) (1994). Similarly, the previous version specified the "applicant for the writ and State" were the only proper parties to such an action. *Id.* The statute even specified that the adjudicating body had to be a "State court of competent jurisdiction." *Id.* In short, although the limitations on relief under the previous version of § 2254 were much less severe, Congress had formulaically announced each procedural requirement that the State Court needed to satisfy in order to warrant federal deference.

Whereas the previous version of § 2254 provided a sort of catalogue of the routine procedures that served as a prerequisite to federal deference, the current version of the statute is considerably pared down in this regard. 28 U.S.C. §2254 (1996). The present version of the statute takes for granted the procedural foundations of a reliable judgment, such as competent jurisdiction and procedural fairness. *See* Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, Federal Practice and Procedure § 4265.2 at 354-55 (2007). In view of the well-established and long-standing expectation of a full and fair review of one's federal claims, the statute's

silence on this point simply cannot be treated as dispositive.[5]

2. Even If the Omission of "Full and Fair" from § 2254 Would, in Normal Circumstances, be Operative, the Legislative History Regarding the Importance of Procedural Fairness Belies Such an Interpretation.

The legislative history of § 2254 substantially predates the congressional debate immediately preceding the 1996 enactment of the AEDPA. *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (Thomas, J.) (noting that as of 1992, Congress had attempted to amend § 2254 for more than 25 years). The ultimate compromise legislation that was enacted cannot be divorced from this lengthy evolution in congressional goals

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[5] One commentator has provided a particularly vivid illustration of the importance of procedural fairness in all adjudications, whether required by statute or not. Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. UNIV. L.Q. 1679, 1687 (2005) ("Imagine that the Supreme Court required all civil rights claims to be decided by flipping a coin. Or that all antitrust issues were to be resolved by consulting a 'Delphic oracle.' Or even that all copyright questions were to be answered by 'studying the entrails of a dead fowl.'")(footnotes omitted). "Just as a coin may provide the 'correct' substantive answer, so might a state habeas court in the absence of a 'full and fair hearing,' but the adjudication of habeas claims requires more than a mere chance that the 'right' result will be reached." Justin F. Marceau, *Deference and Doubt, the Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385, 404 n.93 (2007).

with regard to habeas reform. *Id.* (interpreting the 1966 version of § 2254 and noting that the 25-plus years of legislative debate would not be relevant to legislative interpretation until § 2254 was amended). This Court has yet to acknowledge the defining role that the phrase "full and fair" played in the legislative history of the AEDPA, and this case squarely presents the Court with an opportunity to do so. Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L. J. 283, 302 (2004) (surveying the legislative history and specifically examining the phrase "full and fair").

Ultimately, the legislative history of § 2254 can be summarized as an illustration of the maxim that the greater includes the lesser. *Cf. Posadas de Puerto Rico Assocs v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (recognizing that the greater power to eliminate gambling altogether necessarily includes the lesser power to eliminate casino advertisements). The most severe limitations on federal habeas review considered by Congress were modeled after the scholarship of Professor Bator, who proposed that state court judgments should be given preclusive effect so long as the state court process was "full and fair." *See, e.g.*, Applications for Writs of Habeas Corpus and Post Review of Sentences in the United States Courts, 33 F.R.D. 363, 369-70 (1963). In the years leading up to AEDPA's enactment, however, the model of habeas review built on Bator's vision of absolute federal deference to procedurally full and fair state proceedings was repeatedly and unequivocally rejected by Congress. *See* Larry W. Yackle, *A*

Primer on the New Habeas Corpus Statute, 44 BUFF. L. REV. 381 (1996) (compiling the various legislative proposals). For Senator Arlen Specter and other legislators committed to successfully revising § 2254, avoiding an association or connection with Bator's limited model of habeas review, which had became infamously known as the "full and fair" approach, became a top priority. *Id.* at 438-43; Marceau, 82 TUL. L. REV. at 427-32. Accordingly, understanding the progression of § 2254 from its 1966 version until it was finally amended by the 104th Congress in 1996 is of the utmost importance to the question of whether the current version of the statute requires a full and fair state court proceeding.

In 1963, Professor Bator published his influential article in the Harvard law review, and within a few years the first Congressional proposals to preclude federal habeas review, except when the state court failed to provide a "full and fair" review, began to emerge. *See, e.g.*, Yackle, 44 BUFF. L. REV., at 424-30 (discussing the fact that Bator's model framed the habeas debate from the 1960s through the enactment of AEDPA). In 1968, for example, a proposal to limit federal habeas review was included in the Omnibus Crime Control and Safe Streets Act. *Id. at* 425. In 1973, again at the urging of Assistant Attorney General William Rehnquist, Senator Roman Hruska introduced a bill that would have limited federal habeas review to those cases where the state process was not "full and fair." *Id. at* 425-26. Bator's thesis became the centerpiece of every significant reform proposal for decades: "An application for writ of habeas corpus

on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that has been fully and fairly adjudicated in state court proceedings." S. 2216, 97th Cong. § 5 (1982).

By the 1990s, opponents of Bator's legal process approach ("full and fair") to federal habeas review had become wary of any statutory reform that even contained the phrase. After thirty years of efforts to remove general substantive review by federal courts when the state process was adequate, "full and fair" emerged as a shorthand for the sort of far-reaching habeas reform that would never receive the support of a majority of Congress. *See, e.g.*, S. Rep. No. 98-226, at 24-27 (1983); 137 Cong. Rec. H8001 (daily ed. Oct. 17, 1991) (statement of Rep. Fish) (noting that the attempts to redefine "full and fair" do not adequately address his concern that the reform will have the effect of stripping federal courts' power to review the merits of state habeas decisions); 137 Cong. Rec. H8003 (daily ed. Oct. 17, 1991) (statement of Rep. Hughes) (speaking to the fact that "full and fair" is inextricably linked to procedural rights alone); 137 Cong. Rec. H7894 (daily ed. Oct. 17, 1991) (statement of Rep. Edwards) (noting that "full and fair" has always meant a limited review of the procedural fairness and nothing more).

Recognizing that the phrase "full and fair" had become linked in the legislative consciousness with Bator's model of reform, shrewd compromises began to emerge that attempted to redefine the

phrase "full and fair" more broadly, and in a manner that appealed to those who opposed limiting federal habeas review to state procedural failings. *See, e.g.*, 137 Cong. Rec. H7996 (daily ed. Oct. 17, 1991. For example, Representative Henry Hyde proposed a habeas amendment using the phrase "full and fair," but he expressly abandoned the Bator definition of "full and fair," and instead stated that a state adjudication would not be considered "full and fair" if it was "contrary to or involved an unreasonable interpretation or application of clearly established Federal law." *Id.* In the end, however, merely redefining "full and fair" would not be sufficient. The phrase "full and fair" had become inextricably linked with the Bator process model of adjudication that proved unpalatable to moderates in Congress. *The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the S. Comm. on the Judiciary,* 97th Cong. 153-54 (1982) (testimony of Phylis Skloot Bamberger) (recognizing that any use of the phrase "full and fair" in § 2254 would dominate the provision's interpretation, and force a Bator-like approach to federal habeas review, regardless of clarifying statements by members of Congress).

Keenly aware of the negative baggage accompanying the phrase "full and fair," in proposing a revision to § 2254 Senator Specter submitted a reform proposal that contained absolutely no reference to the stigmatized phrase. S. 623, 104th Cong. (1995). Notably, even though the proposal, which was eventually codified as § 2254(d) did not mention Bator or "full and fair," skeptics like Senator Biden expressed concern that

the "unreasonableness" analysis was a veiled "full and fair" review. *See, e.g.*, 141 Cong. Rec. S7843 (daily ed. June 7, 1995) (statement of Sen. Biden) ("[T]hrough the years we have fought ... over the so-called *full and fair* standard.... This provision suggested by my Republican friends essentially [is] the same thing . . . .") (emphasis added). This demonstrates that the phrase "full and fair" was so thoroughly stigmatized that some legislators feared the Bator model's influence even when the tag phrase was completely omitted from the statute. Under these circumstances, the omission of the language requiring a "full and fair" hearing cannot reasonably be construed as signaling an intent to abandon the requirement of procedural fairness in the state court.[6]

In sum, the omission of the "full and fair" language from § 2254(d) reflects an awareness that many members of Congress were extremely leery of anything that resembled the severe model of reform

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[6] It is worth considering the fact that at the time of AEDPA's debate in Congress, Senator Hatch had proposed a more traditional "full and fair" habeas reform, but was unable to attract sufficient votes. S. 3, 104th Cong. § 508 (1995). Instead, Senator Hatch was forced to accept the more moderate compromise bill proposed by Senator Specter. S. 623, 104th Cong. (1995). It would be odd indeed if the Court read Senator Specter's more limited restrictions on habeas relief as more severe than Senator Hatch's with regard to the question of whether procedurally unreasonable state adjudications were entitled to deference. There is no question that Senator Hatch's more restrictive proposal required full federal review of constitutional claims that were not full and fairly reviewed by the state court, and it follows that § 2254, as passed, must permit such review as well.

proposed by Professor Bator. Likewise, some commentators have observed that the "full and fair" process requirement became an avoidable redundancy once Senator Specter's reform proposal made explicit provision for *de novo* federal review when the state court's review was an "unreasonable" determination of fact or law. Lee, 56 HASTINGS L. J. at 299. As enacted, § 2254 simply cannot bear a reading that would, in significant ways, make it more restrictive than the reform proposed by Professor Bator. Professor Bator proposed eliminating substantive federal review when the state process was procedurally fair, and the reforms that ultimately succeeded were forced to abandon this model centered on the exclusivity of procedural review. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 505 (2007). There is not, however, any suggestion in the history of § 2254 "that the right to conduct substantive review was somehow earned at the expense of the right to ensure procedural fairness." Marceau, 82 TUL. L. REV. at 432. The political compromise that resulted in greater federal habeas review (*i.e.*, substantive review) necessarily includes the right to review the procedural adequacy of the state processes. To hold otherwise would be to ignore the influence of Bator's scholarship on Congressional efforts to reform habeas corpus. Kovarsky, TUL L. REV. at 505 (observing that each successive proposal for habeas reform moderated the substantive limits suggested by Bator's "full and fair" model, without eliminating or minimizing the role of federal courts in ensuring procedural fairness).

II. THE ABSENCE OF A "FULL AND FAIR" REVIEW OF PETITIONER'S CONSTITUTIONAL CLAIM RENDERS THE FOURTH CIRCUIT'S APPLICATION OF THE LIMITATIONS ON RELIEF ANNOUNCED IN § 2254(D)(1) A DUE PROCESS VIOLATION.

Even if the Court concludes that § 2254, as revised in 1996, no longer requires minimally fair procedures for the review of federal claims in state habeas, the Constitution does require such procedures. Adequate state habeas procedures in the form of a full and fair review are particularly imperative where, as here, the claim at issue could not have been raised prior to post-conviction proceedings. *Hall v. Comm.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

Due process requires that every prisoner receive a full and fair review of his federal constitutional claims, either in state or federal court. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441, 456-65 (1963). This requirement does not compel the conclusion that state courts are required by the federal constitution to provide discretionary forms of review. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551 (1987). The due process requirement of minimally adequate procedures does, however, dictate that at some point, either in federal or state court, a prisoner is entitled to the process necessary for a full and fair review of the claims presented.

See, e.g., Bator, 76 HARV. L. REV. at 456-65 (arguing that federal review need not be comprehensive when the state process was adequate); *Panetti v. Quarterman*, 127 S. Ct. 2848, 2856-57 (2007) (recognizing that the absence of constitutionally required procedures dictates that (d)(1) does not apply); *Herrera v. Collins*, 506 U.S. 390, 427 (1993) (O'Connor, J., concurring) (stressing that questions of innocence will rarely arise if all trial and collateral litigation comports with the "Constitution's guarantees of fair procedure").

In this case, there is no dispute that the state court failed to provide the constitutionally minimal procedures required by due process. Pet. App. At 84a (finding that there has never been a "full and fair" review of the claim). Procedural due process requires that at least one level of constitutional review be full and fair. Deference to an unfair proceeding, when it is the only forum for vindicating a federal right, cannot be reconciled with due process. Accordingly, by applying the limitations on relief announced in § 2254(d)(1), rather than reviewing the claim *simpliciter*, the lower Courts have deprived Petitioner of the sort of full and fair review contemplated by due process.

There is no question that federal habeas review under § 2254(d)(1) is extremely limited; the federal court's review, far from being full and fair, is designed to be modest and highly deferential to the state court. *See* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 540 (2008) (surveying some of the habeas case law and concluding that (d)(1) has been interpreted to

impose "a novel and severe limit on federal habeas courts' ability to review state court [decisions]."). Because the Constitution requires a procedurally fair review of federal claims, and because state habeas was the first forum available to Petitioner to vindicate the right in question, the absence of procedural fairness in this case dictates that the limitations on relief announced in (d)(1) must not apply.

A. Due Process Requires a "Full and Fair" Review of Constitutional Claims.

1. The Existence of the Right

The hallmark of due process is, as the term implies, procedural fairness. The quantity and nature of the process due necessarily varies depending on the nature of the liberty interest at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). At a minimum, persons alleging federal challenges to their detentions are entitled to a full and fair review of the claims. *See Wright v. West*, 505 U.S. 277, 299 (1992) (O'Connor, J.); *Townsend v. Sain*, 372 U.S. 293, 313 (1963) (recognizing that the constitution requires additional, otherwise, discretionary federal procedures and review – *i.e.*, an evidentiary hearing – when the state court process is not procedurally "adequate").[7]

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[7] Historically, Congress also recognized "full and fair" as a due process requirement. In the version of § 2254 in effect prior to the enactment of AEDPA, Congress acknowledged that procedural fairness was, among other

Writing for three Justices in *Wright v. West*, Justice O'Connor explained that the requirement that every prisoner receive a "full and fair" review of his federal constitutional claims, whether on direct or collateral review, and whether in state or in federal court, derives from the basic tenets of procedural due process. 505 U.S. at 298 (recognizing the full and fair requirement as an analog to the notice and opportunity to be heard requirements). Justice O'Connor unequivocally concluded that "the absence of a full and fair hearing in the state courts [is] *itself* [a] violation of the Constitution." *Id.* at 299 (emphasis in original).[8] Implicit is the acknowledgment that limitations on federal habeas review might comport with procedural due process so long as at least one state process provides a full and "fair opportunity to correct the error" of constitutional law. *Id.* Conversely, where the state process is patently

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things, a due process requirement. 28 U.S.C. § 2254(d)(6)-(d)(7) (1994) (rejecting deference to state court proceedings when the "applicant did not receive a full, fair and adequate hearing in the State court proceeding; [] or that the applicant was *otherwise denied due process* of law in the State Court proceeding") (emphasis added).

[8]Reviewing the constitutional pedigree of the right, Justice O'Connor rejected the notion that the absence of full and fair review was a mere "prerequisite to a federal court's" habeas review. *Wright*, 505 U.S. at 299 (responding to Justice Thomas's three Judge opinion, *id.* at 278-97). But even Justice Thomas's opinion appears to contemplate full federal review of a claim that was adjudicated in a farcical or procedurally unseemly manner. *Id.* at 285 (focusing on the need for "*absolute*" deference to a procedurally fair state adjudication).

inadequate or unfair, due process requires a full and fair review by the federal habeas court. *Id.* at 298 (recognizing the requirement of a procedurally fair review as "a rule of constitutional law").

Both the majority and dissenting opinions in *Townsend* provide additional support for the settled proposition that due process requires that every federal claim receive a procedurally full and fair review, either in state or federal court. 372 U.S. 293. The majority stressed that just as factual determinations not supported by the record "cannot be conclusive of federal rights," substantial procedural unfairness will also deprive the state court conclusions of any foundation for deference. *Id.* at 316. Justice Stewart took issue with the specific characterization of the constitutional claim at issue, but his dissent reinforced the general relationship between full and fair procedures for the review of federal claims and due process. *Id.* at 334 (Stewart, J., dissenting). Specifically, after reviewing the record as to the claims in question, Justice Stewart concluded that the state's procedures complied with the "Due Process Clause of the Fourteenth Amendment" insofar as the claims in question were "fully and fairly determined in the courts of Illinois." *Id.* In short, the Court was divided as to whether Townsend presented a colorable claim of constitutional injury, but unanimous in concluding that due process requires, at a minimum, a procedurally full and fair review.[9]

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[9] Although Congress codified *Townsend's* full and fair language in 28 U.S.C. § 2254 (1966), these statutory

The conclusion that due process requires that a prisoner alleging a federal constitutional violation receive a full and fair review of this claim, either in state or federal court, also received substantial attention in the late Professor Paul Bator's influential critique of *Brown v. Allen*. Bator, 76 HARV. L. REV. 441. In the context of arguing for more limited federal habeas review, Bator stressed that unencumbered review by the federal courts of the *adequacy of state procedures* was a constitutional necessity. *Id.* at 455-58. Bator did not assert generically the superiority of federal courts as a forum for adjudicating federal claims; instead, Bator merely emphasized the inextricable relationship between due process and the right of a prisoner to have at least one forum fully and fairly review a prisoner's claims. *Id.* For Bator, there was no question that "the essence of the responsibility of the states under the Due Process Clause [is] to furnish a criminal defendant with a full and fair opportunity" to litigate his constitutional claims. *Id.* at 456. The simple wisdom of this theory inheres from the recognition that due process is only served when

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amendments did not, of course, abridge or enlarge the scope of protections available under the due process clause of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress may not "determine what constitutes a constitutional violation."). Accordingly, the silence of the current statute, 28 U.S.C. § 2254 (1996), as to the question of whether a procedurally "adequate" review of the claims is a precondition to federal deference does not alter the scope or application of procedural due process.

comprehensive "federal collateral jurisdiction [serves] as a 'backstop' for inadequacies of state process." *Id.* at 492. It is the need for a full and fair federal backstop for procedural failures that renders (d)(1) inapposite in this narrow context.[10]

2. "Full and Fair" Review Examined

The connection between the right to a procedurally fair review of one's claims and due process has a substantial constitutional pedigree. Occasionally, the full and fair protections were announced without express reference to due process. *See, e.g., Fay v. Noia*, 372 U.S. 391, 458 (1963) (Harlan, J., dissenting). More often, however, consistent with the due process right traced by Justice O'Connor in *Wright* and expounded by Professor Bator, this Court has acknowledged the relationship between a "full and fair" review of federal claims and due process.

In *Moore v. Dempsey*, for example, the Court expressly recognized that the right to an adequate corrective process either in federal or state court derives from procedural protections enshrined in the Due Process Clause of the Fourteenth

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[10] The issue before the Court does not require an expansive ruling on the adequacy of state trial or appellate procedures because the claim at issue is only cognizable on collateral review. *Hall v. Com.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999). Moreover, the Court need not define the contours of due process in all cases, but only recognize that the district court's finding that there was no fair proceeding in state court necessarily implicates due process.

Amendment. 261 U.S. 86, 91-92. (1923). In *Moore*, the Court recognized that the absence of a procedurally fair "corrective process" for allegations of constitutional injury by a prisoner would, without more, constitute a due process violation. *Id.* Specifically, the Court recognized the absence of a full and fair opportunity to litigate constitutional claims as a freestanding due process injury. *Id.* ("If the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a [constitutional error], the State deprives the accused of his life or liberty without due process of law.") (quoting *Frank v. Mangum*, 237 US 309, 335 (1915)).

A federal court is not, as a general matter, required to provide a full and fair review of all federal claims, but in the absence of a procedurally adequate corrective process in the state court, full and fair federal review is compelled by due process. *Compare Moore*, 26 U.S. at 91-92 (requiring a full and fair federal review because such review was not provided by the state court), *with Frank v. Mangum*, 237 U.S. 309 (1915) (refusing to impose a requirement of full federal review because the state had provided a procedurally adequate corrective process); *see also Wright v. West*, 505 U.S. 277, 299 (1992) (O'Connor, J.) (noting that "the 'full and fair hearing' rule . . . defines [a] constitutional claim").[11]

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[11] An application of the balancing test prescribed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), further highlights the constitutional pedigree of the expectation that every prisoner receive at least one full and fair review of his

Notably, the constitutional significance of full and fair adjudications oftentimes arises outside of the federal habeas corpus context and these precedents are instructive for present purposes.[12] In *Miller v. French*, for example, the Court held that the strict time lines for judicial decision making imposed by the Prison Litigation Reform Act do not, without more, offend the Constitution's

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federal claims. In assessing whether a due process violation exists, a critical aspect of the inquiry is the "fairness and reliability of the existing []procedures," balanced against the "the probable value, if any, of additional procedural safeguards." *Id.* Under this test, the due process implications of failing to conduct a full federal review when the state court's procedures are unfair and/or unreliable are plain.

[12]Counsel for amici submit that nearly every circuit has recognized the constitutional force of the right to a full and fair review of one's claims. The right is identified and applied in various contexts, but the constitutional force is beyond debate. *See, e.g., Hepp v. Astrue*, 511 F.3d 798, 804 (8th Cir. 2008) ("Procedural due process under the Fifth Amendment also requires full and fair hearings for disability benefits.") (internal citation omitted); *United States v. Gray*, 491 F.3d 138, 162-63 (4th Cir. 2007) (Michael, J., dissenting) (recognizing a due process right to a full and fair suppression hearing); *Aguilar-Solis v. I.N.S.*, 168 F.3d 565, 569 (1st Cir. 1999) ("[A] party to an immigration case, like any other litigant, is entitled to a full and fair hearing — not an idyllic one."); *Yancey v. Apfel*, 145 F.3d 106, 112 (2nd Cir. 1998) ("Generally, due process requires that a social security disability hearing must be full and fair."); *Frazier v. Kutz*, 139 F.2d 380, 383 (D.C. Cir. 1943) ("[T]he court should afford a full and fair hearing . . . . less than this would not be due process."). The common denominator among the circuits with regard to disparate questions of law is whether the individual received one full and fair review of the federal claim in question.

separation of powers; however, the Court acknowledged that an unreasonably short time limit for judicial decisions might constitute a procedural barrier to a complete and fair adjudication so as to violate due process. 530 U.S. 327, 350 (2000). This conclusion rests on the firmly held view that "due process . . . serves to protect the personal rights of litigants to a full and fair hearing." *Id.*

Similarly, in discussing the appropriateness of federal courts affording preclusive weight to a state court decision for purposes of the Full Faith and Credit Clause, this Court has held that the threshold determination is whether the state proceeding comports with the requirements of due process. *Kremer v. Chem. Constr. Corp.* 456 U.S. 461, 482 (1982). Elaborating on the due process requirement, Justice White explained that full and fair review is the quintessential procedural requirement of due process. *Id.* at 483 n.24. ("[W]hat a full and fair opportunity to litigate entails is the procedural requirements of due process"). In *Kremer*, the Court had no difficulty concluding that "the panoply of procedures" in question satisfied due process;[13] however, the Court

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[13] Just as the concept of full and fair has varied depending on the context of the right in question, the contours of procedural fairness at the state post-conviction level will not be static across all claims and in all circumstances. To be sure, there is "no single model of procedural fairness." *Kremer*, 456 U.S. at 483; *see also Chambers v. Mississippi*, 410 U.S. 284 (1973) (acknowledging cumulative effect of multiple errors as due process concern, even where no single defect in the process constitutes a constitutional violation).

expressly acknowledged that the absence of a full and fair review will, without more, fail to "satisfy the applicable requirements of the Due Process Clause". *Id.* at 483-84. *See also Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922) (linking procedural due process with one's right to have a full and fair hearing in the state court).

A final noteworthy example of the Court's willingness to recognize the non-statutory, and therefore constitutionally grounded, right to fair procedures is *Stone v. Powell*, 428 U.S. 465 (1976). The Court held that the prophylactic and non-individual nature of the exclusionary rule rendered federal habeas review generally inappropriate in this context. Nonetheless, relying on Professor Bator and others, the Court stressed the importance of an adequate "state corrective process." *Id.* at 477. Specifically, the Court conditioned the limitation on federal habeas relief upon the prisoner's "opportunity for full and fair consideration of his search-and seizure claim" in

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Because due process is "the least frozen concept of our law," it is reasonable to expect that "full and fair" will not enjoy identical meaning or application across all contexts or claims. *Medina v. California*, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring); *Boumediene v. Bush*, 128 S. Ct. 2229, 2267 (2008) (recognizing that habeas is an "equitable remedy" that must be applied with flexibility). It seems obvious, for example, that a record-based *Faretta* claim might require significantly less process, than, for example, an evidence-dependent claim such as a *Brady* violation. Furthermore, like nearly all states jurisdictions, ineffective assistance of counsel claims dependent on facts not in the record cannot be raised until state habeas in the state of Virginia. *Hall v. Com.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

state court. *Id.* at 486. That is to say, federal habeas review for the protections enshrined in the Fourth Amendment, though "crucially different from other constitutional rights," could not be unconditionally eliminated. *Id.* at 490. Even as to a Fourth Amendment claim, federal habeas review must be full and fair where the State has failed to provide any procedurally adequate opportunity to litigate the claim. *Id.* at 494; *see also* Bator, 76 HARV. L. REV. at 456 (arguing that due process compels the conclusion that a state adjudication must "not be respected" if the state fails to provide the prisoner with "a full and fair opportunity to litigate the claim"). Due process cannot countenance the absence of a full and fair federal review when there existed no full and fair state process.

In short, procedural due process requires that the sort of liberty interests implicated by federal constitutional rights are entitled to at least one full and fair review by a court of competent jurisdiction. *See Mathews*, 424 U.S. at 335. In the context of § 2254 petitions, in the usual case, the state will provide an adequate corrective process such that the role of federal courts on collateral review might fairly be limited. However, where the state process is patently unfair or incomplete, due process necessitates that the constitutional minimum, a full and fair review of the federal claims, be provided in federal court. *See Boumediene*, 128 S.Ct at 2268 (recognizing importance of one level of procedurally fair review so as to minimize the risk of "an erroneous deprivation of a liberty interest").

B. Federal Review Constrained by (d)(1) is Extremely Deferential, and Therefore Does Not Comport With Due Process Where, as Here, the State Adjudication Was Procedurally Unreasonable.

Because every prisoner is entitled to one full and fair review of their federal claims, due process precludes the application of the deference announced in § 2254(d)(1) to a claim adjudicated in a procedurally unreasonable manner by the state court.

In the usual case, due process does not dictate unconstrained habeas review by a federal court; however, when a state court's review is not full and fair, "the due process clause itself demands that its conclusions of fact or law should not be respected." Bator, 76 HARV. L. REV. at 456 . In other words, due process requires, at a minimum, that a prisoner denied a single procedurally fair review in state court is entitled to a full and fair adjudication on federal habeas review. In the absence of a procedurally adequate state proceeding, federal review constrained by § 2254(d)(1) does not satisfy this constitutional requirement.

This Court has repeatedly concluded that federal habeas review governed by (d)(1) is extremely limited. *See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (precluding, under (d)(1),

a full review of the merits of the constitutional claim that was fairly adjudicated in state court). Indeed, this Court has repeatedly acknowledged that a federal court's review under § 2254(d)(1) is limited, not to determining whether a constitutional violation exists, but to evaluating whether the state court's constitutional analysis was deficient under some substantially higher threshold. *See William v. Taylor*, 529 U.S. 362, 410 (2000). There is no pretense that Congress contemplated that the review of a constitutional claim under (d)(1) would be as exacting or rigorous as a *de novo* review. Neither can the argument be seriously made that the highly deferential review under (d)(1), standing alone, satisfies the "full and fair" level of review contemplated by due process. The question, therefore, is whether a federal court's deferential review under (d)(1), in conjunction with a procedurally unreasonable state adjudication, constitute a full and fair review of the constitutional claim in question. The answer to this question is a resounding "no."

Because due process requires that every federal claim be afforded one full and fair review, federal review constrained by (d)(1) will not comport with due process where, as here, the state court process is not full and fair. If an initial proceeding is not full and fair, then a subsequent review that is significantly constrained by this initial review cannot substitute as a full and fair review in the first instance. If the State of Virginia no longer provided prisoners with any post-conviction review, then with respect to claims that can only be raised through collateral appeals, such

as the ineffective assistance of counsel claim at issue in this case – a claim almost always dependent on development of facts outside the trial record, there would be no question that the federal court's review of the Petitioner's claim would not be limited by (d)(1). Similarly, if, as in this case, the state's post-conviction system functions in such a manner as to be procedurally incomplete or unfair, then there is no justification for applying the limitations announced in (d)(1).[14]

In sum, review under (d)(1) is highly deferential, and such deference is unwarranted as a matter of comity and is unconstitutional as a matter of due process when the proceeding to which such deference is afforded was not full and fair. Accordingly, this Court should hold that the limitations on relief announced in (d)(1) are inapplicable where, as here, there is no dispute that the state court process to deference would

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[14] Notably, the comity concerns that underlie much of the deference prescribed by the AEDPA are not served when a federal court's review is constrained by proceedings in state court that were not full and fair. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity."). Rejecting the application of (d)(1) in cases like this is consistent with the general *quid pro quo* nature of AEDPA's restrictions, providing for heightened finality in proportion to the establishment and provision of fair procedures. *See, e.g.*, § 2254(b)(1) (requiring exhaustion if state provides a post-conviction system); § 2261 (conditioning expedited time-frames for habeas review on, among other things, a mechanism for the appointment of post-conviction counsel).

otherwise attach was not full and fair.[15] Pet. App. 84a

CONCLUSION

Amici accept the interpretation offered by Petitioner in its entirety; indeed, that approach is entirely compatible with the interpretation suggested by amici. Amici submit, however, that even if the Court rejects the interpretation offered by Petitioner, then for the reasons set forth in this brief, the statute, the legislative history of § 2254 and due process compel the conclusion that the limitations on relief provided in (d)(1) should not apply to the instant case. Specifically, Petitioner submits that the procedural inadequacy of Virginia's post-conviction system as applied in this case dictate that(d)(1) is inapplicable, either under the terms of (d)(2) as argued by amici, or under the "adjudication on the merits" requirement announced in the prefatory language of § 2254 and discussed in Petitioner's opening brief. In conclusion, this Court should reverse the Fourth Circuit's denial of habeas corpus relief.

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[15] As this Court recently reiterated, the relationship between procedural due process and the Court's habeas jurisprudence is well "established." *Boumediene* , 128 S. Ct. at 2268. Rewarding objectively unfair state procedures with the deference enshrined in (d)(1) is the very sort of "limited procedure" that creates a risk of erroneous liberty deprivations. *Id.* at 2268, 2248 (recognizing the possibility that "the protections of the Suspension clause have expanded along with the post-1789 developments that define the present scope of the writ").

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-1223

In the
Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,

v.

LORETTA K. KELLY, WARDEN
SUSSEX I STATE PRISON,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37, the Virginia Association of Criminal Defense Lawyers ("VACDL") respectfully requests leave to file the following *amicus curiae* brief in support of petitioner, Edward Nathaniel Bell. Petitioner has consented to the filing of this brief. Respondent has withheld her consent.

VACDL was originally incorporated in 1992 as the Virginia College of Criminal Defense Attorneys, and changed its name in December 2002. VACDL is a statewide organization of Virginia attorneys whose practices are primarily focused on the representation of those accused of criminal violations. It operates exclusively for charitable, educational, and legislative purposes, and has approximately 450 members.

VACDL's mission is to improve the quality of justice in Virginia by seeking to ensure fairness and equality before the law. In particular, VACDL works to protect the individual rights guaranteed by the Virginia and United States Constitutions in criminal cases; resists efforts to curtail those rights; and encourages, through educational programs and other

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[1] Pursuant to S. Ct. R. 37.6, *amicus* state that no counsel for a party authored any part of this brief, and that no counsel or any other party or entity, other than *amicus*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

assistance, cooperation and collaboration among lawyers. To achieve these salutary goals, VACDL participates in legislative matters relating to issues of criminal justice, works with the judiciary to improve the services available to those who appear in court, and provides continuing legal education to practitioners seeking to enhance their skills. VACDL has previously appeared before this Court in cases addressing issues relating to criminal justice issues. *See Walker v. Washington*, No. 05-6942 (2005).

VACDL's members are actively involved in representing defendants in death penalty cases in both trial and post-conviction proceedings. In the course of these representations, VACDL's members have developed expertise in the investigation and presentation of mitigation evidence. By virtue of its members' expertise, and given its knowledge of and experience with Virginia's criminal justice system, VACDL brings an important perspective to the issues before the Court that cannot be adequately appreciated or conveyed by any other party.

This submission underscores the practical importance of this case to death-penalty practitioners and their clients. It also seeks to clarify the contours of this Court's federal habeas jurisprudence and to explain the strong policy reasons why federal courts should not be constrained by the strictures of 28 U.S.C. § 2254(d) when reviewing a claim of constitutional error, based on new evidence developed for the first time in a federal evidentiary hearing, that was not properly adjudicated on its merits by the state court. Where, as in Mr. Bell's case, a prisoner diligently seeks to

develop evidence supporting substantial claims of constitutional error, but is unreasonably denied a full and fair hearing by the state court, VACDL's members have a strong interest in ensuring that their clients' constitutional rights are protected through the federal habeas process. Especially in Virginia, where restrictive procedures often limit a prisoner's ability to develop and prove claims of constitutional error, federal court habeas proceedings are an essential bulwark against arbitrary sentences and convictions. Indeed, when a Virginia death-penalty prisoner raises a claim that can be presented only in post-conviction proceedings, such as a claim for ineffective assistance of counsel, the federal court oftentimes is the only forum where the prisoner has a fair and adequate opportunity to develop evidence and obtain a proper adjudication on the merits of his claim.

Because the decision of the court of appeals below, denying Mr. Bell relief on his Sixth Amendment ineffective assistance claim, misapplies the federal statutory requirements and is out of step with this Court's decisions in *Willams (Terry) v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), VACDL and its members have a strong interest in having that decision corrected. VACDL accordingly supports the petitioner's request that the judgment of the Fourth Circuit be reversed.

For these reasons, VACDL seeks leave to file the attached *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

The federal district court found that, although petitioner diligently attempted to develop and present the factual basis of his ineffective assistance of counsel claim in state habeas proceedings, the state court unreasonably denied petitioner a full and fair hearing. After a federal evidentiary hearing under 28 U.S.C. § 2254(e)(2), at which petitioner developed and presented substantial new evidence, the district court held that the performance of petitioner's trial counsel was constitutionally deficient and that the state court's decision to the contrary was objectively unreasonable. The district court nonetheless viewed itself constrained by 28 U.S.C. § 2254(d) and, rather than reviewing de novo petitioner's ineffective assistance claim based on the new evidence properly developed in the federal proceedings, held the Virginia Supreme Court reasonably determined that trial counsel's deficient performance was not prejudicial. The Fourth Circuit affirmed.

The question presented is:

Did the Fourth Circuit err when it applied the restrictive standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice that was properly received for the first time in a federal evidentiary hearing, which the state court did not have before it and did not consider?

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H.R. Rep. No. 104-23 (1995) 4

Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and their Relations to the States (Mar. 12, 1990) 13

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Yackle, Larry W.,
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44 Buff. L. Rev. 381 (1996)..... 5

INTRODUCTION AND SUMMARY OF ARGUMENT

When a state court's decision denying habeas corpus relief on a substantial claim of constitutional error does *not* take into consideration significant, relevant evidence that is later properly developed in a federal evidentiary hearing, the state court has not appropriately adjudicated the claim on its merits, and the federal court should carefully assess the new evidence, reviewing the claim de novo without giving deference to the state court's decision. That conclusion is both logical and legally correct. The court of appeals' decision to the contrary—that federal courts must defer to a state court decision denying habeas relief even when the decision is based on a defective fact-finding process—is wrong and should be reversed. (*See* Section I, below.)

For reasons set forth below, requiring federal courts to vindicate federal constitutional rights, unimpeded by any constraint on their authority to grant habeas corpus relief, when the state court's fact-finding procedures are inadequate, will not overburden the federal judiciary or otherwise improperly interfere with state prerogatives. A federal evidentiary hearing is not authorized unless (i) the prisoner has diligently sought to develop the factual basis of his claims in state court; (ii) the state court's record is inadequate; and (iii) the character and quality of evidence developed in the federal evidentiary hearing is significant enough to give rise to a new claim not properly adjudicated on its merits by the state court. As a practical matter, these threshold requirements are difficult to satisfy and will be met only in rare cases where, as here, the state procedures prevent a prisoner from reasonably

developing the factual basis of his claims on either direct review or in post-conviction proceedings. In these unusual, pristine set of circumstances, where a prisoner has acted diligently but has nonetheless been unreasonably deprived of a full and fair opportunity to present a substantial claim of constitutional error, the federal courts have a solemn obligation to adjudicate the prisoner's claims on their merits, evenhandedly, and with due regard for the important federal constitutional rights at stake. (*See* Section II, below.)

In this case, the federal district court appropriately determined that the Virginia Supreme Court unreasonably denied the petitioner, Mr. Edward Bell, an opportunity to develop the factual basis of his claim of ineffective assistance of counsel. The federal court nonetheless declined to consider the merits of Mr. Bell's claim de novo and instead held that, although trial counsel's performance fell well below the minimum constitutionally required standards, and although the state court's decision was the product of a defective fact-finding process, the Virginia Supreme Court reasonably determined that counsel's defective performance was not prejudicial. That decision misconstrues the statutory requirements and does *not* faithfully apply this Court's settled precedents. If the court below had properly considered the substantial evidence developed in the federal evidentiary hearing and adhered to precedent, there is only one reasonable conclusion—had the jury been able to consider the extensive and powerful mitigation evidence developed on federal habeas, there is a reasonable probability that at least one juror would have refused the death penalty. The court of appeals' decision

below should therefore be reversed. (*See* Section III, below.)

ARGUMENT

I. 28 U.S.C. § 2254(d) Does Not Apply When Significant New Evidence Is Properly Developed In A Federal Evidentiary Hearing.

For reasons explained in petitioner's brief, and for the additional reasons set forth below, 28 U.S.C. § 2254(d)'s limits on federal court authority to grant habeas relief do not apply in the unusual circumstances where a federal court is considering a substantial claim of constitutional error based on new evidence developed and properly presented for the first time in a federal evidentiary hearing under section 2254(e)(2). When a federal court determines that a death-penalty prisoner has acted diligently, and that the state court has unreasonably denied the prisoner a full and fair hearing on his post-conviction claims, the federal court's review is de novo. If the state court's decision is not based on an adequate evidentiary record, the state court cannot have properly adjudicated the claim on its merits, and the federal court is not constrained by the strictures of section 2254(d).

A. Federal Courts Have An Obligation To Protect Against Arbitrary Denials Of Constitutional Rights.

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, to restrict federal courts' authority to grant habeas relief when a state court has already determined the merits of a claim of constitutional

error, "*provided* th[e] determination[] does not conflict with federal law or apply federal law in an unreasonable way." *Williams (Terry) v. Taylor*, 529 U.S. 362, 387 (2000) (emphasis added) (quoting H.R. Conf. Rep. No. 104-518, at 111 (1996)). Congress designed AEDPA to serve two fundamental purposes—on one hand, streamlining federal habeas procedures to avoid unnecessary duplicative litigation of claims already fully adjudicated on their merits in state court, while, on the other hand, reaffirming federal courts' overarching responsibility to safeguard federal constitutional rights.

AEDPA's provisions thus reflect Congress's desire to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under the law." *Williams (Terry)*, 529 U.S. at 386. As this Court has noted, AEDPA was intended to correct "abuses of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases." H.R. Rep. No. 104-23, at 8 (1995); *see Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays ... and 'to further the principles of comity, finality, and federalism'") (citations omitted). Accordingly, when a state court has properly adjudicated a claim of constitutional error on its merits, AEDPA's provisions "create an independent, high standard" that must be "met before" the "federal court may issue a writ of habeas corpus." *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007); *see also Williams (Terry)*, 529 U.S. at 412-13 (O'Connor, J., concurring) (AEDPA "places a new constraint on the power of a federal habeas court to grant" relief "with respect to claims adjudicated on the merits in state court").

Although AEDPA refined certain aspects of habeas practice and procedure, it left intact the general corpus of habeas law and did not disturb federal courts' authority and solemn obligation to protect against the violation of constitutional rights. *See* U.S. Const., art. I, § 9 cl. 2 ("the Privilege of the Writ of Habeas Corpus shall not be suspended"); *Williams (Terry)*, 529 U.S. at 378-79; *see also* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 398 (1996) (describing Congress's rejection of legislative proposals that would have largely abolished federal habeas corpus). As the Court has recognized, "[e]ven in the context of federal habeas," avoiding re-litigation of decisions properly decided by a state court, "does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also* 141 Cong. Rec. S7846 (daily ed., June 7, 1995) (statement of Sen. Hatch) (it "is absolutely false" to conclude that section 2254 requires deference "even if the State is wrong about the U.S. Constitution"). To the contrary, under AEDPA, "errors that undermine confidence in the fundamental fairness of the state adjudication" justify the issuance of the federal writ. *Williams (Terry)*, 529 U.S. at 375. The writ of habeas corpus thus remains, as the Founders intended it, as a vital protection against "arbitrary punishments upon arbitrary convictions." The Federalist No. 83 (A. Hamilton); *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969) (the writ of habeas corpus "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action").

AEDPA's plain language tracks these dual purposes. Section 2254(d) constrains federal court

authority to grant habeas relief "with respect to any claim" that was properly "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). Under the familiar statutory standards, when a state court properly adjudicates a claim on its merits, the federal court may not grant relief unless the state court's decision (i) is contrary to, or involves an unreasonable application of, clearly established federal law; or (ii) is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d)(1) & (2).

AEDPA nonetheless provides that, when a state court does *not* adjudicate a claim on its merits, the federal courts are open to prisoners seeking to vindicate important constitutional rights. *See Williams (Michael) v. Taylor*, 529 U.S. 420, 436-37 (2000). Congress thus recognized that, in limited and defined circumstances, an evidentiary hearing in federal court may be appropriate when a prisoner seeks to press a substantial claim of constitutional error for which the "factual basis" was not developed in the state court proceedings. 28 U.S.C. § 2254(e)(2). A federal evidentiary hearing is permitted if the claim relies on either a new rule of constitutional law "made retroactive," or a "factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* Similarly, an evidentiary hearing is permitted if the "facts underlying the claim" are "sufficient to establish by clear and convincing evidence that but for [the] constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." *Id.*

As petitioner's brief sets forth in detail, AEDPA's provisions, construed as a whole, do not restrict a federal court's authority to grant habeas relief when (i) a defendant is not afforded a reasonable opportunity to present factual evidence during state court proceedings, and (ii) significant factual evidence giving rise to a new claim, not considered by the state court, is developed in a federal evidentiary hearing under section 2254(e)(2). *See* Pet. Br. 23-39. The point is both logical and fundamental: A federal court cannot meaningfully evaluate a state court's decision as to whether a prisoner is held in violation of clearly established federal law when a claim arising from new, relevant evidence was not considered and, therefore, not adjudicated on the merits by the state court. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2859 (2007) (claim considered de novo where "factfinding procedures upon which the court relied were 'not adequate for reaching reasonably correct results'"); *see also Dugas v. Coplan*, 506 F.3d 1, 6-7 (1st Cir. 2007) (a federal court's review is "de novo" because it "can hardly defer to the state court on an issue that the state court did not address"). Indeed, because the question "whether a state court's decision was unreasonable must be assessed in light of the record the [state] court had before it," *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004), section 2254(d) does not and cannot reasonably apply to a claim based on new factual evidence developed for the first time in federal habeas proceedings.

B. Petitioner's Reading Of The Statutory Requirements Conforms With Precedent And AEDPA's Underlying Purposes.

This straightforward, commonsense interpretation of AEDPA's provisions is supported by authorities from a variety of different contexts. As these authorities recognize, a decision is neither reliable nor objectively reasonable if it is the product of a defective fact-finding process.

Most significantly, this Court has held that section 2254(d) does not apply to issues properly raised on federal habeas that were not examined or resolved by the state court. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing issue of prejudice "de novo" because the state courts "never reached the issue"); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same). Similarly, when considering *Brady* claims, courts have held that section 2254(d)'s restrictions do not apply if substantial new evidence, not considered by the state court, is developed in the course of a federal evidentiary hearing. *See, e.g., Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003) (section 2254(d) "does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings"); *see also* Pet. Br. 24-26 (citing other cases).

These decisions are controlling here. There is no meaningful distinction for AEDPA's purposes between a claim of constitutional error not properly adjudicated on its merits because it was never decided by the state court, and an emaciated claim never properly adjudicated on its merits because the

prisoner was unreasonably denied a full and fair opportunity to substantiate the claim with evidentiary support. *See, e.g., Wingo v. Wedding*, 418 U.S. 461, 474 (1974) (recognizing that the "outcome of a lawsuit—and hence the vindication of legal rights"—often turns on how the "factfinder appraises the facts"). Just as state courts may not directly turn a blind eye to the violation of clearly established federal law, they also should not be allowed to do so indirectly by unreasonably declining to consider proffered evidence that a prisoner has diligently sought to develop and put before the court for consideration. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the Constitution "'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections"); *see also* Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and its Limits*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 312-15 (Richard A. Epstein & Michael S. Greve, eds., 2007) (tracing history of the "anti-circumvention principle" as a necessary principle that "operates in just about all statutory settings").

This approach comports with the bedrock principle, long-recognized in other contexts, that a decision is inherently unreasonable if the decisionmaker has "entirely failed to consider an important aspect of the problem" before it. *Motor Vehicle Mfrs. Assn. of U. S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under the Administrative Procedures Act, 5 U.S.C. § 706, for example, a reviewing court generally may not disturb a decision rendered by an Article II branch administrative agency, unless the decision is unreasonable, arbitrary, or contrary to law. *See* 5

U.S.C. § 706 (2)(A). This Court has nonetheless long recognized that, notwithstanding the substantial deference ordinarily afforded agency decisionmaking, de novo review is appropriate "where there are inadequate fact-finding procedures in adjudicatory proceedings." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also* 5 U.S.C. § 706(2)(F). Accordingly, when a party satisfies the high threshold showing required to demonstrate that an agency's fact-finding procedures are inadequate, the reviewing court is obliged to hold a "de novo hearing," undertake a searching review of the evidence, and "thereafter determine whether the agency action was 'unwarranted by the facts.'" *Camp*, 411 U.S. at 141.

These elemental principles are consistent with AEDPA's clear distinction between, on one hand, limiting a federal court's authority to revisit a claim that a state court has properly adjudicated on its merits, and, on the other, authorizing a federal court to conduct an evidentiary hearing when the factual basis for the claim is not developed in the state court proceedings. *See Panetti*, 127 S. Ct. at 2859 (federal court reviews issues de novo when state court "fact-finding procedures ... were 'not adequate for reaching reasonably correct results' or ... resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth'"). As long as a death penalty prisoner meets the demanding standards of section 2254(e)(2), the federal court should fairly and fully consider the evidence supporting a claim of constitutional error, without the burden of a heavy, anti-constitutional thumb on the scales in favor of denying habeas relief. *Cf. Vieth*

v. Jubelirer, 541 U.S. 267, 295 (2004) (the "Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms").

Finally, recognizing that a federal court should review de novo claims that are based on new evidence not considered by the state court is consistent with AEDPA's broader, underlying purposes. Comity and federalism concerns are not served by limiting federal courts' authority to grant habeas relief when the state court fact-finding process is unreasonably abbreviated or otherwise defective. *See* Pet. Br. 37-39. Similarly, if a federal court has appropriately granted an evidentiary hearing consistent with the strict requirements of section 2254(e), limiting the federal court's authority to consider and properly evaluate the evidence will do nothing to further AEDPA's goals of reducing delays and expediting the post-conviction review process. *See* Rules Governing § 2254 Cases, Rule 8 (permitting district court judge to refer petition to magistrate, but requiring court to review de novo any proposed findings of fact and recommendations to which any party objects). To the contrary, once an evidentiary hearing is granted, any interest in streamlining the federal habeas process weighs strongly in favor of considering the evidence developed on its own terms—and not in light of whatever coloration might be cast by a prior, inadequate state court procedure. When a prisoner has been unreasonably denied a fair opportunity to prove a claim of constitutional error in state court, it falls to the federal courts to step up and fulfill the "duty" of vindicating the vital "rights secured by the"

federal Constitution. *Williams (Michael)*, 529 U.S. at 436-37.

II. Recognizing Federal Courts' Authority To Review De Novo Claims Based On Evidence Not Considered By The State Court Poses Little Risk Of Overburdening The Federal Judiciary.

A decision recognizing that federal courts are not constrained by section 2254(d) when considering claims based on new evidence developed and presented for the first time on federal habeas will neither overburden the federal judiciary nor improperly interfere with state prerogatives. A petitioner seeking a federal evidentiary hearing on substantial claims of constitutional error must overcome several hurdles. These hurdles ensure that federal courts engage in de novo review in only limited, appropriate circumstances.

A. A Prisoner Must Diligently Seek To Develop The Factual Basis Of His Claims.

Before deciding whether to grant an evidentiary hearing, the federal district court must make a threshold determination that the prisoner has acted diligently to preserve his claims. *See* 28 U.S.C. § 2254(e)(2)(A)(ii). This Court has held that "diligence" under section 2254(e)(2) ordinarily requires the petitioner to make a "reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams (Michael)*, 529 U.S. at 435. At a minimum, the prisoner in the "usual" case must "seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

If a prisoner has been "unable to develop his claim in state court despite diligent effort," however, the state court may have failed its "duty ... to vindicate rights secured" by the federal Constitution and a federal evidentiary hearing may be appropriate. *Id.* at 436-37. In this case, for example, the district court held that Mr. Bell "diligently developed the factual basis" of his ineffective assistance claim, as required under section 2254(e)(2). *Bell v. True*, 413 F. Supp. 2d 657, 699 (W.D. Va. 2006). That finding has not been challenged or disputed by the Warden. *See* Pet. Br. 2.

But cases, like this one, where a prisoner has acted with diligence are likely to be rare. As a majority of the members of this Court have recognized, habeas cases requiring evidentiary hearings have been "few in number" and "there is no clear evidence that" such hearings have "burdened the dockets of the federal habeas courts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting); *Schriro v. Landrigan*, 127 S. Ct. 1933, 1954 (2007) (Stevens, J., dissenting). To the contrary, even prior to passage of AEDPA, which restricted federal courts' authority to hold evidentiary hearings, it is estimated that district courts held evidentiary hearings in only 1.17% of all federal habeas cases. *See Schriro*, 127 S. Ct. at 1954 (Stevens, J., dissenting) (citing Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and their Relations to the States (Mar. 12, 1990) (Richard A. Posner, Chair)).

B. The State Court Record Must Be Inadequate.

Even if a prisoner is found to have acted with requisite diligence, a federal evidentiary hearing is not required if the state court has considered the relevant facts. Federal courts are not required "to allow federal habeas applicants to develop ... insubstantial factual allegations in evidentiary hearings." *Schriro*, 127 S. Ct. at 1940. Instead, as this Court recently held, if a prisoner seeks to introduce new evidence that would not likely change the result of the state court's decision, the district court has "discretion to deny an evidentiary hearing." *Id.* at 1944. An evidentiary hearing is not required on issues that can be fairly resolved by reference to the state court record. *See id.* at 1940.

Numerous states have adopted procedures designed to ensure that death penalty prisoners are afforded a full and adequate hearing through the state habeas process. *See* Jordan Steiker, *Restructuring Post-conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal F. 315, 342 (1998) (describing how federal habeas review has created incentives for states to expand their own post-conviction procedures). In some states, such as North Carolina, for example, there are robust statutory or constitutional entitlements to discovery. *See, e.g.*, N.C. Gen. Stat. § 15A-1415(f); *State v. Bates*, 348 N.C. 29, 38 (1998). Similarly, in other states, such as Arizona and Louisiana, the state legislatures have codified post-conviction measures that authorize trial courts to order appropriate evidentiary hearings in post-conviction proceedings.

See, e.g., Ariz. Rev. Stat. § 13-4238 (a "defendant is entitled to a hearing to determine issues of material fact"); La Code Crim. P. Art. 930 (an "evidentiary hearing ... shall be ordered whenever there are questions of fact which cannot properly be resolved" on the pleadings or through summary disposition).

Virginia has taken a different approach. In 1995, the Virginia General Assembly amended its state habeas statute to impose restrictive time limits on the filing of state habeas petitions, and provided the Virginia Supreme Court with exclusive jurisdiction over petitions filed by inmates on death row. *See* 1995 Va. Laws Ch. 503; Va. Code Ann. § 8.01-654 (granting the Virginia Supreme Court "exclusive jurisdiction to consider and award writs of habeas corpus"). With these statutory changes, the Virginia General Assembly directed that habeas petitioners are entitled to evidentiary hearings only upon "order of the [Virginia] Supreme Court." Va. Code Ann. § 8.01-654.

The decision to grant an evidentiary hearing in Virginia is therefore not made by the trial judge who issued the death sentence. Accordingly, under Virginia's statutory scheme, the court that is most familiar with the trial proceedings, and in the best position to assess the appropriateness of a post-conviction evidentiary hearing, has no authority to order one. *See Massaro v. United States*, 538 U.S. 500, 506 (2003) (noting that the judge who "observed the earlier trial" has "an advantageous perspective for determining the effectiveness of counsel's conduct"; *Koon v. United States*, 518 U.S. 81, 98 (1996) (district courts "have an institutional advantage over appellate courts" in making decisions requiring a "refined assessment" of issues arising

from the fact-specific circumstances of a case). Instead, the decision to grant an evidentiary hearing rests exclusively in the hands of seven appellate justices who, of necessity, must collectively reach their decision based on a cold record.

Given this, it is perhaps not surprising that the 1995 revisions to Virginia law have significantly reduced the number of evidentiary hearings granted during the state habeas process. A search of published and unpublished decisions in the Westlaw legal database show that, before the 1995 change in Virginia law, at least 33 out of 67 death row prisoners (roughly 49%) were afforded evidentiary hearings. In stark contrast, between 1995 and July 2008, a search of both the Westlaw legal database and the unpublished decisions available on the Virginia Supreme Court's official website, suggest that only 5 out of 57 petitioners (roughly 9%) were permitted an evidentiary hearing in which to develop the factual basis of their claims. *See Hedrick v. Warden*, 570 S.E.2d 840, 845 (2002); *Lovitt v. Warden*, 585 S.E.2d 801, 805 (2003); *Yarbrough v. Warden*, 609 S.E.2d 30, 32 (2005); *Lenz v. Warden*, 593 S.E.2d 292, 296 (2004); *Lewis v. Warden*, 645 S.E.2d 492 (2007). The upshot of the 1995 changes to Virginia's habeas law, at least in the view of some commentators, has been a drastic curtailment of prisoners' ability to fully and fairly adjudicate their claims on the merits. As one experienced observer has suggested, the Virginia Supreme Court "never grants any resources to the attorneys who are litigating the cases, denies every request for expert assistance, denies every request for discovery, denies every motion of any consequence, and then dismisses every petition without an evidentiary hearing."

Frank Green, *State's Executions Reaching a Peak Under Gilmore, As Attorney General He Speeded Process*, Richmond Times Dispatch, Dec. 13, 1998, at C-1.

Whatever the accuracy of these observations as a general matter, they undoubtedly apply in Mr. Bell's particular case. As the district court found, the "fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" on Mr. Bell's ineffective assistance claim. 413 F. Supp. 2d at 699. In fact, before arriving in federal court, Mr. Bell was denied any reasonable opportunity to substantiate his post-conviction claims. *See Lenz v. Commonwealth*, 544 S.E.2d 299, 304 (2001) ("[c]laims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal"). Although Mr. Bell sought leave to exceed the court-imposed 50-page limit on petitions for habeas relief, *see* Va. S. Ct. Rule 5:7A(g); requested an evidentiary hearing, *see* Va. Code § 8.01-654(C), Va. S. Ct. Rule 5:7A(h); sought discovery, *see* Va. S. Ct. Rule 4:1(b)(5); requested the appointment of investigators and mental health experts to assist in the presentation of his claims, *see* Va. Code § 19.2-264.3:1-2; and asked leave to amend the record, *see* Va. S. Ct. Rule 1:8, these requests were all summarily denied. Equally significant, the Virginia Supreme Court disposed of Mr. Bell's petition, without a hearing, even though it resolved important factual disputes against Mr. Bell and in favor of the Warden, and then granted the Warden's motion to dismiss. *See* Pet. Br. 57-58; *cf. Walker v. Young*, No. CL04-54, 2004 WL 1858702, at *3 (Va. Cir. Ct. Aug. 6, 2004) ("where a motion to dismiss has been filed,

the prisoner, as the non-moving party, must be given the benefit of all inferences").

These abbreviated procedures ensured that Mr. Bell was not able to develop his post-conviction claim of ineffective assistance until he was afforded the opportunity for the first time in federal court. There is no requirement that a state provide full and fair evidentiary hearings as part of the state habeas process. Nonetheless, when a state fails to do so and the factual bases for a claim are properly developed in federal proceedings, nothing should restrict the federal court's authority or otherwise prevent it from granting appropriate relief.

C. The Evidence Must Be Sufficient To Give Rise To A New Claim.

Even if a prisoner has acted with diligence, and even if a federal evidentiary hearing is warranted, the federal court is not required to conduct de novo review unless the factual record developed in the federal habeas proceedings gives rise to a new claim that has not been adjudicated on the merits within the meaning of section 2254(d).

As petitioner's brief explains, a prisoner on federal habeas must come forward with sufficient evidence and aggregate facts to support a substantial claim of constitutional error. *See* Pet. Br. 26-35. If the facts developed on federal habeas are significant and sufficiently different from the facts considered by the state court, the newly developed facts effectively give rise to a new "claim" that was not adjudicated on its merits and should be considered de novo by the federal court.

Here, again, the point is a logical one: when the evidence developed on federal habeas does not

meaningfully expand on the facts considered by the state court, a federal court's authority is appropriately constrained by section 2254(d); in contrast, where, as here, the evidence is significant and the state court improperly declined to consider it, de novo review is warranted.

III. If The Evidence In This Case Is Reviewed De Novo, It Is Clear That Trial Counsel's Deficient Performance Was Prejudicial Under *Strickland*.

Three times in the past eight years, this Court has vacated capital sentences on grounds that a state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), where defense counsel failed to investigate or present significant mitigating evidence. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000). This case is closely analogous to, and is controlled by, these authorities. Had the jury been able to place Mr. Bell's history of childhood abuse and cognitive impairments "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 513.

The Fourth Circuit erred by characterizing the evidence developed by Mr. Bell as "cross-purpose" evidence and, therefore, not relevant to establishing prejudice under *Strickland*. But, as petitioner's brief explains, that characterization does not reasonably describe the extensive mitigation evidence presented in the federal habeas proceedings. *See* Pet. Br. 53-55. It is also legally incorrect. The mitigating evidence on which the Court relied in *Rompilla*,

Wiggins, and *Williams* readily could have been characterized as "cross-purpose" evidence, but that fact was not relevant. As courts have recognized, it is "nearly always the case" that evidence in mitigation could be characterized as double-edged or as opening the door to some "harmful information." *Outten v. Kearney*, 464 F.3d 401, 422 (3d Cir. 2006).

It is precisely for these reasons that this Court has held that, where, as here, a prisoner's counsel has rendered defective performance and failed to develop substantial mitigating evidence, the prisoner has satisfied *Strickland*'s prejudice prong. A Virginia jury may return a death sentence only upon a unanimous verdict, and each individual juror is free to refuse the death penalty. *See* Va. Code Ann. §§ 19.2-264.2, 19.2-264.4 (2007). Accordingly, the jury in this case should have been given the opportunity to consider the extensive mitigating evidence that could well have convinced a single juror to refuse the death penalty and grant mercy.

The Fourth Circuit's decision below reflects its continued refusal to acknowledge the prejudicial effect of counsel's failure to investigate and present available mitigating evidence. On matters as fundamental as the right to effective assistance of counsel, this continued failure to faithfully abide by this Court's precedents should not be left undisturbed.

* * *

This Court's modern death-penalty jurisprudence makes clear that, if the death penalty is to retain its utility as a condign punishment society is prepared to mete out in response to the most heinous crimes against the social order, it must

be applied fairly, reliably, and consistent with federal constitutional requirements. In turn, Congress has determined that when state court fact-finding procedures are inadequate, federal courts are authorized to conduct evidentiary hearings to allow evidence to be developed and presented on substantial claims of constitutional error. For those hearings to be meaningful, the federal court's review of claims, based on the evidence properly developed in the federal evidentiary hearing and not considered by the state court, must be conducted de novo and unconstrained by the strictures of AEDPA's section 2254(d).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit and remand with instructions to grant habeas relief.

Respectfully submitted,

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JOINT APPENDIX

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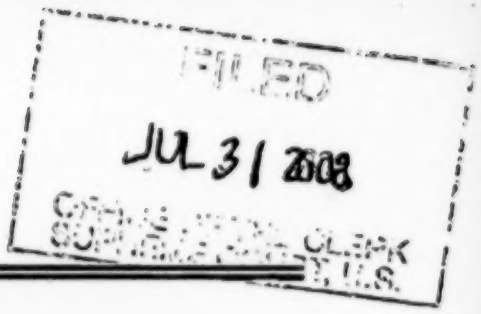

No. 07-1223

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Fourth Circuit
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Date Filed	#	Docket Text
		* * *
09/13/2006	2	Docketing statement filed by Appellant Edward Nathaniel Bell. [4462368-1] T/S needed: Y; T/S already on file: N. [06-22] ~ [4462368]
		* * *
09/18/2006	1	Death penalty case docketed.
09/18/2006	5	Docketing notice issued. [06-22] ~ [4462406]
		* * *
10/03/2006	16	District Court notice received of the granting of certificate of appealability. [06-22] ~ [4470904]
10/04/2006	19	Certification transcript filed in district court by Sonia Ferris on 10/4/06. [06-22]
10/16/2006	21	Certification transcript filed in district court by Diana P. McGlothlin. [06-22]

10/16/2006	22	Record on appeal follow-up notice sent to the district court [06-22] Record on appeal now due 10/30/06.
10/18/2006	24	Certification of ROA complete and retained in the District Court. [06-22] ~ [4479430]
		* * *
10/31/2006	30	Supplemental certification of ROA complete and retained in district court. . [06-22] ~ [4486125]
11/01/2006	31	Certification transcript filed in district court by Sonia Ferris on 10/30/06. [06-22]
		* * *
01/04/2007	43	Motion filed by Appellant Edward Nathaniel Bell for expansion of certificate of appealability. Motion contained in brief?: N. ~ [4518880] [06-22]
		* * *
01/11/2007	46	Response/answer filed [4520164-1] by Appellee Loretta K. Kelly opposing motion for expansion of COA [4518880-1], opposing motion to file oversized motion [4518881-1] [06-22] ~ [4520164]
		* * *

01/19/2007	50	Reply filed by Appellant Edward Nathaniel Bell to motion for expansion of COA [4518880-1] . [4523987-1] [06-22] ~ [4523987]
02/07/2007	55	COURT ORDER filed [4533736] denying motion for expansion of COA [4518880-1], granting motion to file oversized motion [4518881-1] Copies to all parties. ~ [4533736] [06-22]

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03/12/2007	67	Certification transcript filed in district court by Sonia Ferris on 3/9/07. [06-22]

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04/06/2007	70	Certification transcript filed in district court by Bridget A. Dickert on 4/5/07. [06-22]
04/06/2007	71	Briefing order filed. Copies to all parties. [06-22] ~ [4562530] Appellant(s) brief/joint appendix due 5/16/07 for Edward Nathaniel Bell.
04/10/2007	72	Supplemental certification of ROA complete and retained in district court. . [06-22] ~ [4564322]

* * *

05/02/2007	86	Reply filed by Appellant Edward Nathaniel Bell to response/answer [4574871-1]. [4576829-1] [06-22] ~ [4576829]
		* * *
07/13/2007	94	Brief and joint appendix filed by Appellant Edward Nathaniel Bell. Copies of brf: 6 Sealed portion?[Y/N]: N # Brf pages: 81 # Apx Copies(include vol #'s): 6 of Vols. 1-5 # Sealed copies: 5 of Vol. 6 # Apx pages: 2,565 2-sided copying?[Y/N]: Y Sufficient?[Y/N]: Y Method of filing w/ court: HD Date of Service on parties: 7/13/07 Type of service on parties: PM [06-22] ~ [4614645] Appellee brief due 8/15/07 for Loretta K. Kelly
		* * *
07/13/2007	96	Certificate filed by Appellant Edward Nathaniel Bell to place a portion Vol. 6 of the appendix under seal [4614696-1]. [06-22] [06-22]
07/13/2007	97	ORDER FILED [4614698] granting certificate to pl port of apx under seal [4614696-1] [06-22] Copies to all parties. ~ [4614698] [06-22]

07/13/2007	98	Document(s) placed under seal . Type of document: Vol. 6 of joint appendix. [06-22]
		* * *
08/13/2007	101	Brief filed by Appellee Loretta K. Kelly. Copies of brief: 8 # brf pages: 66. Sufficient[Y/N]?: Y. SEALED?[Y/N]: N. Method of filing w/ court: HD Date of Service on parties: 8/13/07 Type of service on parties: PM [06-22] ~ [4630010]
08/27/2007	106	Case calendared for oral argument. Case calendared for oral argument on: 10/30/07. [06-22] ~ [4637320]
08/30/2007	107	Reply brief filed by Appellant Edward Nathaniel Bell. Copies of brief: 6 # brf pages: 40. Sufficient[Y/N]?: Y. SEALED[Y/N]?: N. Method of filing w/ court: HD Date of Service on parties: 8/30/07 Type of service on parties: HD [06-22] ~ [4639881]

08/30/2007	108	Motion filed by Appellant Edward Nathaniel Bell to file supplemental appendix [4639885-1] Supplemental appendix tendered? (Y/N): Y. ~ [4639885] [06-22]
08/30/2007	109	Response/answer requested to motion to file supplemental appendix [4639885-1] Response/answer due 9/12/07 for Loretta K. Kelly. ~ [4639887] [06-22]
09/12/2007	113	Response/answer filed [4645879-1] by Appellee Loretta K. Kelly opposing motion to file supplemental appendix [4639885-1] [06-22] ~ [4645879]
09/18/2007	115	COURT ORDER filed [4648552] granting motion to file supplemental appendix. [4639885-1] Copies to all parties. ~ [4648552] [06-22]
09/18/2007	116	Supplemental appendix filed by Appellant Edward Nathaniel Bell. Copies of apx: 5 #apx pages: 217. Sufficient?[Y/N]: Y. SEALED vol.[Y/N]?: N [06-22] ~ [4648564]

09/27/2007	119	Motion (unopposed) filed by Appellant Edward Nathaniel Bell for additional argument time. [4654186-1] Total time requested: 30 minutes per side. ~ [4654186] [06-22]
09/27/2007	120	ORDER FILED [4654188] granting motion for additional argument time [4654186-1] Total time granted: 30 minutes per side. Copies to all parties. ~ [4654188] [06-22]

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10/30/2007	124	Oral argument heard. Panel: Honorable Paul V. Niemeyer, Honorable Dennis W. Shedd, Honorable Allyson K. Duncan. Katherine P. Baldwin for Appellee Loretta K. Kelly, Matthew K. Roskoski for Appellant Edward Nathaniel Bell. Robert Edward Lee, Jr. present but not arguing. Courtroom Deputy: Beth. [06-22]
01/04/2008	126	UNPUBLISHED AUTHORED OPINION filed. Originating case number: 7:04-cv-00752-jpj Copies to all partiesand the district court/agency. [997782818] [06-22]

01/04/2008	127	JUDGMENT ORDER filed. Decision: affirmed. Originating case number: 7:04-cv-00752-jpj Entered on Docket Date: 01/04/2008. [997782826] Copies to all parties and the district court/agency [06-22]
		* * *
01/18/2008	130	PETITION for rehearing and rehearing en banc filed by Edward Nathaniel Bell. [06-22]
01/18/2008	131	Mandate stayed by FRAP 41(d)(1). [06-22]
01/29/2008	132	COURT ORDER filed [997796285] denying motion for rehearing and rehearing en banc. [997791527-2] Copies to all parties. [06-22]
02/05/2008	133	MOTION filed by Appellant Edward Nathaniel Bell to stay mandate [FRAP 41(d)]. Date of service: 02/05/2008 [997800919] [06-22]
02/05/2008	134	Mandate stayed by FRAP 41(d)(1). [06-22]

02/06/2008	135	RESPONSE/ANSWER filed by Loretta K. Kelly to Motion to stay mandate [FRAP 41(d)] [997800919-2]. Nature of response: in opposition. [06-22]
02/12/2008	136	COURT ORDER filed [997805046] denying motion to stay mandate [FRAP 41(d)] [997800919-2]; updating mandate deadline. Copies to all parties. [06-22]
02/19/2008	137	DOCUMENT re: order scheduling execution filed by Appellee Loretta K. Kelly. [997808040] [06-22]
02/20/2008	138	Mandate issued. Links to final decision and judgment: [997782826-2],judgment order , [997782818-2], Opinion. Originating case number: 7:04-cv-00752-jpj [06-22]
03/13/2008	139	MOTION filed by Appellant Edward Nathaniel Bell for stay of April 8, 2008 execution pending filing and disposition of petition for writ of certiorari. Date of service: 03/13/2008 [997823096] [06-22]

03/13/2008	140	NOTICE ISSUED to Loretta K. Kelly requesting response to motion for stay of execution. [997823096-2] Response due: 03/17/2008.[997823099] [06-22]
03/17/2008	141	RESPONSE/ANSWER filed by Loretta K. Kelly to motion for stay of execution [997823096-2], notice requesting response [997823099-2]. Nature of response: in opposition. [06-22]
03/17/2008	142	COURT ORDER filed [997824611] denying motion for stay of execution [997823096-2]. Copies to all parties and U.S. Supreme Court. [06-22]

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03/31/2008	145	SUPREME COURT REMARK--petition for writ of certiorari filed. Filed Date: 03/26/2008. Supreme Court Case Number: 07-1223. [06-22]
04/01/2008	146	DOCUMENT re: statement of Governor Kaine granting reprieve of execution date until July 24, 2008, filed by Appellee Loretta K. Kelly. [997833214] [06-22]

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05/12/2008	148	SUPREME COURT REMARK-- other action - order entered 5/12/08 granting application for stay of execution. [06-22]

U.S. District Court for the Western District of Virginia (Roanoke)

Case No. 7:04-cv-00752

Date Filed	#	Docket Text
12/22/2004	1	NOTICE OF INTENT TO FILE HABEAS CORPUS PETITION, MOTION to Appoint Counsel, MOTION to Stay Execution by Edward N. Bell. (Attachments: # 1 Text of Proposed Order) (ssm) (Entered: 12/23/2004)
12/22/2004	2	Brief / Memorandum in Support re 1 MOTION to Appoint Counsel MOTION to Stay filed by Edward N. Bell. (ssm) (Entered: 12/23/2004)
12/22/2004	3	MOTION for Leave to Proceed in forma pauperis by Edward N. Bell. (Attachments: # 1 Affidavit)(ssm) (Entered: 12/23/2004)
12/23/2004	4	RESPONSE to Motion re 1 MOTION to Appoint Counsel MOTION to Stay *Execution* filed by William Page True. (Baldwin, Katherine)

12/23/2004	5	ORDER granting 1 Motion to Appoint Counsel, granting 1 Motion to Stay, and STAYING the execution set for January 7, 2005 until further order of this court; and granting 3 Motion for Leave to Proceed in forma pauperis . Signed by Judge James P. Jones on 12/23/04. (Filing Deadlines to be established in scp. order.) (ssm)
12/28/2004	6	Letter from Judge Jones to counsel regarding stay of execution (mka)
01/03/2005	8	REPLY to Response to Motion re 1 MOTION to Appoint Counsel MOTION to Stay filed by Edward N. Bell. (Attachments: # 1 Affidavit Attorney Affidavit in Support of Ex-Parte Motion)(Sheldon, Jonathan)
		* * *
01/03/2005	10	Brief / Memorandum in Opposition re 1 MOTION to Appoint Counsel MOTION to Stay *Memorandum in Oppostion to Warden's Response* filed by Edward N. Bell. (Sheldon, Jonathan)

01/03/2005	13	Sealed Document/Ex Parte Affidavit. (aec) (Entered: 01/06/2005)
01/05/2005	11	REPLY to Response to Motion re 1 MOTION to Appoint Counsel MOTION to Stay *Supplemental Reply to Response to Motion* filed by Edward N. Bell. (Sheldon, Jonathan)
01/05/2005	12	State Court Records from Supreme Court of Virginia. Not available for electronic viewing. (aec) (Entered: 01/06/2005)
01/06/2005	14	Response re 8 Reply to Response to Motion, 10 Brief / Memorandum in Opposition, 11 Reply to Response to Motion *Response in opposition* filed by William Page True. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3)(Baldwin, Katherine)
01/06/2005	15	First MOTION to Appoint Expert *and Statement for Need for Confidentiality* by Edward N. Bell. (Sheldon, Jonathan)

01/07/2005	16	NOTICE by William Page True re 13 Sealed Document, 15 First MOTION to Appoint Expert *and Statement for Need for Confidentiality Ltr AG to Sheldon re ex parte* (Baldwin, Katherine)
01/07/2005	17	First MOTION for Leave to File *ex-parte documents under seal by Guidance of the court* by Edward N. Bell. (Sheldon, Jonathan) Additional attachment(s) added on 1/7/2005 (sas,).
01/07/2005	18	Notice of Correction re 17 First MOTION for Leave to File ex-parte documents under seal by Guidance of the court: Proposed order added as an attachment (sas,)
01/13/2005	19	Response *In Opposition To Motion For Investigator And Mitigation Specialist* filed by William Page True. (Baldwin, Katherine)
01/13/2005	20	State Court Records from Winchester Circuit Court. (aec) (Entered: 01/18/2005)

* * *

01/28/2005	23	State Court Records from Supreme Court of Virginia. Available for viewing in Clerk's Office. (eps,)

* * *

02/16/2005	26	OPINION AND ORDER denying First MOTION to Appoint Expert *and Statement for Need for Confidentiality* 15 filed by Edward N. Bell,and denying First MOTION for Leave to File *ex-parte documents under seal by Guidance of the court* 17 filed by Edward N. Bell, and directing that Petition for a Writ of Habeas Corpus be filed within 90 days, and whatever else the Opinion and Order says. Signed by Judge James P. Jones on 2/16/05. (Callahan, Sharon)
02/18/2005	27	Second MOTION to Appoint Expert *Mitigation Specialist and Investigator* by Edward N. Bell. (Sheldon, Jonathan)

* * *

02/25/2005	29	RESPONSE in Opposition re 27 Sccond MOTION to Appoint Expert *Mitigation Specialist and Investigator* filed by William Page True. (Attachments: # 1 Exhibit Warden's exhibit 1)(Baldwin, Katherine)

* * *

03/14/2005	31	REPLY to Response to Motion re 27 Second MOTION to Appoint Expert *Mitigation Specialist and Investigator* filed by Edward N. Bell. (Attachments: # 1 Appendix Exhibit A to Reply to Opposition# 2 Appendix Exhibit B to Reply to Opposition)(Sheldon, Jonathan)
03/15/2005	32	NOTICE of Hearing on Motion 27 Second MOTION to Appoint Expert *Mitigation Specialist and Investigator*: Motion Hearing set for 3/21/2005 03:45 PM via conference call in Abingdon before Judge James P. Jones. (aec)

03/21/2005	33	Minute Entry for proceedings held before Judge James P. Jones : Motion Hearing held on 3/21/2005 re 27 Second MOTION to Appoint Expert Mitigation Specialist and Investigator filed by Edward N. Bell. (Court Reporter Diana McGlothlin, Legal Writers) (lmh)
03/21/2005	34	ORAL ORDER taking under advisement 27 MOTION to Appoint Expert Mitigation Specialist and Investigator filed by Edward N. Bell. by Judge James P. Jones on 3/21/05. (lmh)
03/23/2005	35	RESPONSE in Support re 27 Second MOTION to Appoint Expert *Mitigation Specialist and Investigator Supplement to Application for Investigators* filed by Edward N. Bell. (Attachments: # 1 Affidavit Psychologist affidavit# 2 Exhibit Virginia MR Statute)(Sheldon, Jonathan)
		* * *
04/13/2005	38	CJA 31: Appointment of Expert(Paralegal expenses) in Death Penalty Proceedings.. Signed by Judge James P. Jones on April 12, 2005. (aec)

04/13/2005	39	CJA 31: Appointment of Expert (Paralegal expenses) in Death Penalty Proceedings. Signed by Judge James P. Jones on April 12, 2005. (aec)
04/15/2005	40	MOTION for Reconsideration re 26 Order, *to file petition within 90 days*, by Edward N. Bell. (Attachments: # 1 Memorandum of Law)(Sheldon, Jonathan)
04/20/2005	41	RESPONSE in Opposition re 40 MOTION for Reconsideration re 26 Order, *to file petition within 90 days*, filed by William Page True. (Baldwin, Katherine)
04/29/2005	42	OPINION AND ORDER denying 40 Motion for Reconsideration, denying 27 Motion to Appoint Expert. Signed by Judge James P. Jones on 4/29/05. (Callahan, Sharon)
		* * *
05/12/2005	47	USCA Letter/Notice re: Writ of Mandamus (05-9). (rkc) (Entered: 05/13/2005)
05/17/2005	48	Petition for Writ of Habeas Corpus ad prosequendum by Edward N. Bell. (Attachments: # 1 Appendix # 2 Appendix # 3 Appendix)(Sheldon, Jonathan)

05/18/2005	49	Supplemental Petition for Writ of Habeas Corpus ad prosequendum *Additional Appendix* by Edward N. Bell. (Attachments: # 1 Appendix # 2 Appendix)(Sheldon, Jonathan)
		* * *
05/19/2005	52	ORDER TO SHOW CAUSE. Response due by 6/20/2005. Signed by Judge James P. Jones on 5/19/2005. (Jones, James)
		* * *
05/19/2005	55	USCA Order denying Petition for Writ of Mandamus. (mec,)
05/19/2005	56	USCA Judgment (mec,)
		* * *
06/13/2005	60	First MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus* by Edward N. Bell. (Attachments: # 1 Amended Petition# 2 Appendix Part 1 of 2# 3 Appendix Part 2 of 2)(Connell, James)
06/14/2005	61	Letter by William Page True *re Bell's Motion to Amend.* (Baldwin, Katherine)
06/16/2005	62	MOTION to Dismiss by William Page True. (Baldwin, Katherine)

06/16/2005	63	Brief/Memorandum *w/motion dismiss - first half* filed by William Page True. (Baldwin, Katherine)
06/16/2005	64	Brief/Memorandum *w/motion dismiss - last half* filed by William Page True. (Baldwin, Katherine)
06/17/2005	65	RESPONSE in Opposition re 60 First MOTION to Amend/ Correct *Petition for a Writ of Habeas Corpus* filed by William Page True. (Baldwin, Katherine)
06/20/2005	66	REPLY to Response to Motion re 60 First MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus* filed by Edward N. Bell. (Roskoski, Matthew)
06/24/2005	67	OPINION AND ORDER granting 60 Motion to Amend/Correct . Signed by Judge James P. Jones on 6/24/05. (Callahan, Sharon)
07/05/2005	68	NOTICE by Edward N. Bell *Statement Specifying Manner of Amendment of Petition* (Roskoski, Matthew)

07/05/2005	69	NOTICE by Edward N. Bell re 68 Notice (Other) *Appendix A to Statement Specifying Manner of Amendment of Petition* (Roskoski, Matthew)
07/06/2005	148	Minute Entry for proceedings held before Judge James P. Jones : Evidentiary Hearing (Day 2) held on 7/6/2005. (Court Reporter Sonia Ferris, OCR.) (aec) (Entered: 07/07/2006)
07/08/2005	70	Brief/Memorandum *supplement to June 16 memorandum of law* filed by William Page True. (Baldwin, Katherine)
07/11/2005	71	ORDER FIXING BRIEFING SCHEDULE. Signed by Judge James P. Jones on 7/11/2005. (Callahan, Sharon)
		* * *
08/01/2005	75	Brief / Memorandum in Opposition re 62 MOTION to Dismiss filed by Edward N. Bell. (Roskoski, Matthew)
		* * *
08/22/2005	77	Response re 75 Brief / Memorandum in Opposition filed by William Page True. (Attachments: # 1)(Baldwin, Katherine)

* * *

09/19/2005	80	Letter by Edward N. Bell. (Roskoski, Matthew)
09/19/2005	81	Additional Evidence by Edward N. Bell *Second Supplemental Appendix*. (Roskoski, Matthew)
09/21/2005	82	CJA 24 - Request and Authorization for Transcript. Signed by Judge James P. Jones on September 21, 2005. (aec)
09/21/2005	83	Minute Entry for proceedings held before Judge James P. Jones : Motion Hearing held on 9/21/2005 re 62 MOTION to Dismiss filed by William Page True. (Court Reporter Bridget Dickert, OCR.) (aec) (Entered: 09/22/2005)
09/21/2005	84	ORAL ORDER taking under advisement 62 Motion to Dismiss . Entered by Judge James P. Jones on September 21, 2005. (aec) (Entered: 09/22/2005)
10/13/2005	86	TRANSCRIPT of Motion Hearing Proceedings held on 9/21/05 before Judge James P. Jones. Court Reporter: Bridget Dickert. (lmh)

* * *

02/07/2006	92	OPINION AND ORDER granting in part and denying in part 62 Motion to Dismiss. Signed by Judge James P. Jones on 2/7/06. (Callahan, Sharon)

* * *

02/15/2006	95	Minute Entry for proceedings held before Judge James P. Jones : Status Conference held on 2/15/2006 via conference call w/ counsel Roskoski, Connell, Saunders and Baldwin. (Court Reporter Bridget Dickert, OCR.) (aec)

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02/15/2006	97	SCHEDULING ORDER. Signed by Judge James P. Jones on 2/15/2006. (Callahan, Sharon)
02/22/2006	99	MOTION for Leave to File *Section 848(q) Motion Ex Parte* by Edward N. Bell. (Roskoski, Matthew)
02/22/2006	100	MOTION for Leave to File *Section 848(q) Motion Ex Parte Certificate of Service* by Edward N. Bell. (Roskoski, Matthew)

02/25/2006	101	RESPONSE in Opposition re 99 MOTION for Leave to File *Section 848(q) Motio[illegible] Ex Parte* filed by William Page True. (Baldwin, Katherine)
03/05/2006	102	ORDER denying 99 Motion for Leave to File. Signed by Judge James P. Jones on 3/5/06. (Callahan, Sharon)
03/28/2006	105	MOTION to Appoint Expert by Edward N. Bell. (Connell, James)
03/28/2006	106	Brief / Memorandum in Support re 105 MOTION to Appoint Expert filed by Edward N. Bell. (Attachments: # 1 Exhibit Lessemun CV# 2 Exhibit Albarus CV# 3 Exhibit Cunningham CV# 4 Exhibit Stetler article# 5 Affidavit Albarus affidavit# 6 Affidavit Cunningham affidavit)(Connell, James)
04/06/2006	107	RESPONSE in Opposition re 105 MOTION to Appoint Expert filed by William Page True. (Baldwin, Katherine)
04/07/2006	108	Letter by William Page True *re new Warden's name.* (Baldwin, Katherine)

* * *

04/11/2006	110	ORDER granting in part and denying in part 105 Motion to Appoint Expert. Signed by Judge James P. Jones on 4/11/06. (Callahan, Sharon)
04/20/2006	111	MOTION for Reconsideration by Edward N. Bell. (Roskoski, Matthew)
04/20/2006	112	Memorandum in Support re 111 MOTION for Reconsideration filed by Edward N. Bell. (Attachment: # 1 Exhibit); Counsel had docketed memo as a motion; redocketed correctly as a memo by clerk.(aec) (Entered: 04/21/2006)
04/21/2006	113	Notice of Correction re 112 Memorandum in Support; (Attachment: (1) Exhibit) ; Counsel had docketed memo as a motion; redocketed correctly by clerk as a memo.(aec)
05/01/2006	114	RESPONSE in Opposition re 111 MOTION for Reconsideration filed by William Page True. (Baldwin, Katherine)

05/02/2006	115	MOTION for Leave to File *Reply Memorandum in Support of Motion to Reconsider Denial of Funds* by Edward N. Bell. (Attachments: # 1 Reply Memorandum in Support of Motion to Reconsider Denial of Funds# 2 Certificate of Service)(Roskoski, Matthew)
05/03/2006	116	OPINION AND ORDER denying 111 Motion for Reconsideration. Signed by Judge James P. Jones on 5/3/06. (Callahan, Sharon)

* * *

05/30/2006	120	MOTION for Leave to File */Serve Discovery* by Edward N. Bell. (Attachments: # 1 Memorandum of Law in Support of Motion)(Roskoski, Matthew)
06/02/2006	121	Order Directing the Warden at Sussex I State Prison to transport the plantiff to Court for hearing on July 5, 2006 . Signed by Judge James P. Jones on 6/2/2006. (Jones, James)
06/03/2006	122	RESPONSE in Opposition re 120 MOTION for Leave to File */Serve Discovery* filed by William Page True. (Baldwin, Katherine)

06/05/2006	123	Witness List by William Page True. (Baldwin, Katherine)
06/05/2006	124	Witness List by Edward N. Bell. (Attachments: # 1 Certificate of Service)(Roskoski, Matthew)
06/05/2006	125	Exhibit List by Edward N. Bell.. (Attachments: # 1 Certificate of Service)(Roskoski, Matthew)
06/05/2006	126	NOTICE by Edward N. Bell *of Filing of Certificate of Compliance* (Attachments: # 1 Certificate of Service)(Roskoski, Matthew)
06/05/2006	127	MOTION To Admit Testimony of Jamaican Mitigation Witnesses by Edward N. Bell. (Attachments: # 1 Memorandum in Support# 2 Exhibits A-O# 3 Exhibits P-R# 4 Certificate of Service)(Roskoski, Matthew)
06/07/2006	128	ORDER denying 120 Motion for Leave to File. Signed by Judge James P. Jones on 6/7/2006. (Callahan, Sharon)
06/13/2006	129	MOTION for Summary Judgment by William Page True. Responses due by 6/22/2006 (Baldwin, Katherine)

06/13/2006	131	RESPONSE in Opposition re 127 MOTION To Admit Testimony of Jamaican Mitigation Witnesses filed by William Page True. (Baldwin, Katherine) Additional attachment(s) added on 6/14/2006 (aec,).
06/13/2006	132	Memorandum in Support re 129 MOTION for Summary Judgment filed by William Page True. (Attachments: # 1 Exhibit 1 (Letter)# 2 Exhibit 2 (Affidavits of Mark B. Williams and Jud A. Fishel)(eot) (Entered: 06/14/2006)
		* * *
06/14/2006	134	Objections by Respondent William Page True re 125 Exhibit List by Edward N. Bell.. (Attachments: # Certificate of Service)(Roskoski, Matthew) filed by Edward N. Bell,. (Baldwin, Katherine)
06/14/2006	135	MOTION for Leave to File *Reply Brief* by Edward N. Bell. (Roskoski, Matthew)

06/14/2006	136	Petitioner's Reply Memorandum in Support of Motion to Admit Testimony of Jamaican Mitigation Witnesses)(Roskoski, Matthew) Modified on 6/15/2006--delete the 2nd entry of motion, and corrected docket entry (kab).
06/14/2006	137	MOTION for Leave to File *Nunc Pro Tunc, Overlength Brief* by Edward N. Bell. (Roskoski, Matthew)
06/15/2006	138	MOTION in Limine by William Page True. (Attachments: # 1 # 2 # 3 # 4)(Baldwin, Katherine)
		* * *
06/16/2006	140	MOTION to Take Deposition by Edward N. Bell. (Roskoski, Matthew)
06/19/2006	141	Objections by Petitioner Edward N. Bell re 123 Witness List by William Page True. (Baldwin, Katherine) filed by William Page True,. (Roskoski, Matthew)
06/26/2006	142	RESPONSE in Opposition re 138 MOTION in Limine filed by Edward N. Bell. (Attachments: # 1 Exhibit)(Roskoski, Matthew)

06/26/2006	143	RESPONSE in Opposition re 129 MOTION for Summary Judgment filed by Edward N. Bell. (Attachments: # 1 Exhibit List# 2 Exhibits 1-6# 3 Exhibit 7# 4 Exhibit 8# 5 Exhibits 9-19# 6 Exhibits 20-39# 7 Exhibit 40 - Part 1# 8 Exhibit 40 - Part 2# 9 Exhibit 41 - Part 1# 10 Exhibit 41 - Part 2# 11 Exhibit 42 - Part 1# 12 Exhibit 42 - Part 2# 13 Exhibit 42 - Part 3)(Roskoski, Matthew)
06/26/2006	144	MOTION for Leave to File *Courtesy Copy of Petitioner's Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment* by Edward N. Bell. (Attachments: # 1 Courtesy Copy)(Roskoski, Matthew)

06/27/2006	145	ORDER denying 140 renewed motion for depositions on grounds that there has been insufficient cause shown; denying 127 Motion to admit testimony of Jamaican Mitigation Witnesses; denying 137 motion for leave, nunc pro tunc, to file overlength brief; denying 135 motion for leave to file reply brief; denying 138 motion in limine seeking to preclude the testimony of eight witnesses except as to proposed witness Connie Greer; As to such proposed witness the motion is granted and such witness is precluded on the grounds that the actual process of jury deliberation is not legally relevant to the issue of prejudice; Motion for leave to submit courtesy copy 144 is denied as an attempt to circumvent the page limitation of the court's scheduling order; motion for summary judgment 129 is denied w/o prejudice to the assertion of the arguments made therein at the conclusion of the evidentiary hearing. Signed by Judge James P. Jones on June 27, 2006. (cot)

07/05/2006	147	Minute Entry for proceedings held before Judge James P. Jones : Evidentiary Hearing (Day 1) held on 7/5/2006. (Court Reporter Sonia Ferris.) (aec) (Entered: 07/06/2006)
07/05/2006	155	Evidentiary Hearing (Day 1) Exhibit List; Exhibits not available for electronic viewing. (aec) (Entered: 07/28/2006)
07/06/2006	149	Evidentiary Hearing (Day 2) Exhibit List as to Edward N. Bell and William Page True. Exhibits not available for electronic viewing.(aec) (Entered: 07/07/2006)
07/06/2006	154	Minute Entry for proceedings held before Judge James P. Jones : Evidentiary Hearing (Day 2) held on 7/6/2006. (Court Reporter Sonia Ferris.) (aec) (Entered: 07/28/2006)
07/07/2006	150	ORDER denying Supplemental/Amended Petition for Writ of Habeas Corpus ad prosequendum 49 filed by Edward N. Bell. Signed by Judge James P. Jones on July 7, 2006. (aec)

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07/21/2006	152	MOTION to Amend/Correct *Judgment* by Edward N. Bell. (Attachments: # 1 Certificate of Service)(Roskoski, Matthew)
07/27/2006	153	RESPONSE in Opposition re 152 MOTION to Amend/Correct *Judgment* filed by William Page True. (Baldwin, Katherine)
07/28/2006	156	REPLY to Response to Motion re 152 MOTION to Amend/Correct *Judgment* filed by Edward N. Bell. (Attachments: # 1 Certificate of Service)(Roskoski, Matthew)
08/02/2006	157	ORDER denying 152 Motion to Amend/Correct. Signed by Judge James P. Jones on 8/2/06. (Callahan, Sharon)
		* * *
08/31/2006	160	NOTICE OF APPEAL by Edward N. Bell. $455 Filing Fee is Required. Appeal Record due by 11/9/2006. (Connell, James)
09/12/2006	161	TRANSCRIPT REQUEST by Edward N. Bell for proceedings held on 3/21/05 before Judge Jones, re 160 Notice of Appeal (Connell, James)

09/12/2006	162	TRANSCRIPT REQUEST by Edward N. Bell for proceedings held on 7/5-6/06 before Judge Jones, re 160 Notice of Appeal (Connell, James)
09/13/2006	163	Transmittal of Notice of Appeal to 4CCA re 160 Notice of Appeal NOTE: The Docketing Statement and Transcript Order forms are available on the 4th Circuit Court of Appeals website at www.ca4.uscourts.gov. If applicable, the original CJA24(s) will be mailed directly to you by the District Court. (tvt)
09/15/2006	164	CJA 24 issued by 4CCA - Request and Authorization for Transcript. Signed by Judge James P. Jones on September 15, 2006. Original forwarded to Sonia Ferris this date.(aec)
09/18/2006	165	USCA Notice of Case Opening 06-22 Case Manager Beth Walton (tvt)
09/18/2006	166	USCA Notice of Transcript Order Request;court reporter Sonia Farris (tvt)

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09/18/2006	170	ORDER granting Certificate of Appealability. Signed by Judge James P. Jones on 9/18/06. (Callahan, Sharon)
09/19/2006	171	CJA 24 - Request and Authorization for Transcript issued by 4CCA. . Signed by Judge James P. Jones on September 19, 2006. Original forwarded to Diana McGlothlin this date.(aec)
		* * *
10/04/2006	173	Appeal Transcript filed for Evidentiary Hearing, Day 1 held 7/5/06 before Judge James Jones, re 160 Notice of Appeal Court Reporter: Sonia Ferris. (Ferris, Sonia)
10/04/2006	174	Appeal Transcript filed for Evidentiary Hearing, Day 2 held 7/6/06 before Judge James Jones, re 160 Notice of Appeal Court Reporter: Sonia Ferris. (Ferris, Sonia)
10/10/2006	175	MOTION for Expansion of Certificate of Appealability by Edward N. Bell. (Connell, James)

10/12/2006	176	ORDER denying 175 Motion. Signed by Judge James P. Jones on 10/12/06. (Callahan, Sharon)
10/16/2006	177	USCA Notice of transmitting the certificate since transcript has been filed. (tvt)
10/18/2006	178	TRANSCRIPT of Motion to Appoint Experts held on 03/21/05 before Judge James P. Jones. Court Reporter: Diana L. Phipps, Legal Writers. (Dameron, Brenda)
10/18/2006	179	Certificate of Clerk to 4CCA - Record is Complete (tvt)
10/19/2006	180	Consent MOTION to Supplement Record on Appeal by Edward N. Bell. (Connell, James)
10/20/2006	181	ORDER granting 180 Motion to supplement the record . Signed by Judge James P. Jones on October 20, 2006. (aec)
10/24/2006	182	USCA Notice of Transcript Order Request, Court Reporter Sonial Farris (tvt)
10/24/2006	183	USCA Notice of Transcript Order Acknowledgment to Sonia Farris (tvt)

10/25/2006	184	CJA 24 - Request and Authorization for Transcript issued by 4CCA. Signed by Judge James P. Jones on October 24, 2006. Original voucher forwarded to Sonia Ferris this date.(aec)
10/30/2006	185	Appeal Transcript filed for Ruling of Court at Evidentiary Hearing held 7/6/2006 before Judge James P. Jones, re 160 Notice of Appeal Court Reporter: Sonia Ferris. (Ferris, Sonia)
10/31/2006	186	Supplemental Certificate of Clerk to 4CCA - Record is Complete (tvt)
10/31/2006	187	ORDER of USCA as to 160 Notice of Appeal filed by Edward N. Bell, (tvt)

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03/09/2007	192	TRANSCRIPT of Opening Comments and Motions held on July 5, 2006 before Judge James P. Jones. Court Reporter: Sonia Ferris. (Ferris, Sonia)
03/09/2007	193	TRANSCRIPT of Opening Motions and Objections held on July 6, 2006 before Judge James P. Jones. Court Reporter: Sonia Ferris. (Ferris, Sonia)

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04/05/2007	195	Appeal Transcript filed for Motions Hearing via Conference Call held 2/15/07 before Judge James P. Jones, re 160 Notice of Appeal Court Reporter: B. Dickert. (bad)
04/10/2007	196	Supplemental Certificate of Clerk to 4CCA - Record is Complete (tvt)
01/07/2008	197	USCA Memorandum Opinion from 4th Circuit re 160 Notice of Appeal Affirmed decided on 01/04/2008 (tvt)
01/07/2008	198	USCA Notice of Judgment (tvt)
01/07/2008	199	USCA JUDGMENT as to 160 Notice of Appeal filed by Edward N. Bell (tvt)
01/18/2008	200	USCA Notice of Petition of Rehearing with Petition of Rehearing En Banc (tvt)
01/18/2008	201	USCA Notice of Stay of Mandate (tvt)
01/29/2008	202	ORDER of USCA as to 160 Notice of Appeal filed by Edward N. Bell (tvt)

02/05/2008	203	USCA Notice of Stay of Mandate (tvt)
02/20/2008	204	MANDATE of USCA as to 160 Notice of Appeal filed by Edward N. Bell (tvt)
03/17/2008	205	ORDER of USCA as to 160 Notice of Appeal filed by Edward N. Bell (tvt)

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

V. **DOCKET NO. CR99-478 & 489**
CR00-2 & 3

EDWARD NATHANIEL BELL

ORDER

The Court has previously granted leave to Luke H. Boyd, Jr., Esquire, to withdraw as Co-Counsel for the Defendant, Edward Nathaniel Bell, and the Court does now appoint Jud A. Fischel, Esquire, as Co-Counsel for the Defendant.

The Clerk shall forward copies of this Order to: Jud A. Fischel, Esquire, 24 Ashby Street, Warrenton, Virginia 20186; J. Lloyd Snook, Esquire, Lead Counsel, at Snook & Haughey, P.C., 108 5th Street SE, Suite 307, Charlottesville, Virginia 22902; Paul H. Thomson, Esquire, Commonwealth's Attorney, 5 North Kent Street, Winchester, Virginia 22601; and to Edward Nathaniel Bell, the Defendant, at the CFW Regional Jail, Fort Collier Industrial Park, Winchester, Virginia 22601.

ENTER: January 19, 2000

/s/ Dennis L. Hupp
JUDGE

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

VS. DOCKET NO. CR99000478
CR99000489
CR00000002
CR00000003

EDWARD N. BELL

CITY OF WINCHESTER CIRCUIT COURT
WINCHESTER-FREDERICK JUDICIAL CTR
5 NORTH KENT STREET, ROOM 3-D
WINCHESTER, VIRGINIA 22601
DATE: MAY 12, 2000

The above-entitled matter came on to be heard for the purpose of a **Motions Hearing**

BEFORE:

THE HONORABLE DENNIS L. HUPP
presiding

* * *

[284] * * * PROCEEDINGS * * *

(**WHEREUPON**, the Court Reporter was sworn.)

THE CLERK: The case of Commonwealth of Virginia versus Edward N. Bell, Docket Number 99CR478, 489, 2000CR2 and 3.

THE COURT: Let the record show that the Defendant is present in person with Mr. Fischel as counsel. Mr. Thomson and Mr. Abrams both appear for the Commonwealth.

This comes on today on Defendant's Motions. Mr. Fischel, I will let you address those Motions.

MR. FISCHEL: Thank you, Your Honor.

If I may, I would like to address first and possibly only the notice that I faxed yesterday and hand delivered today.

Your Honor, I have, before I even go into it, I have letters, copies of letters, a letter from Mr. Snook that I advised yesterday. And I might say on the record that it might be best that the record reflect that as a result of what I am going to say now, I first had a conversation yesterday with Mr. Thomson, who graciously suggested and authorized me to have an ex parte conversation with the Court by telephone, which we did **[285]** have, with no conclusions being made, but at least alerted the Court to what the situation was. I appreciate Mr. Thomson. . .

THE COURT: And I appreciate being alerted too.

MR. FISCHEL: Yes, sir.

THE COURT: Certainly we did not go into the merits of the Motion. . .

MR. FISCHEL: Right.

THE COURT: . . .nor did I make any decision. . .

MR. FISCHEL: Exactly.

THE COURT: . . .in respect thereto, but it gave me, I guess, forewarning of what was coming.

MR. FISCHEL: Yes, sir. And I appreciate Mr. Thomson's courtesy in that regard.

Your Honor, I have a copy of the letter from Mr. Snook that I received which I will speak to on the record in a moment. I will pass it on to the Court and to Mr. Thomson. I would point out that on the second page I have marked out one paragraph that actually relates to trial strategy that we were talking about and would be inappropriate to reveal at this time to anybody. I would **[286]** also ask that once these letters are received and reviewed by each of you that I intend to speak to it but not speak from it and would ask that the letter coming to the Court be kept under seal until the resolution of the case itself. I mean, ultimately, it should be public, but while we prepare for and present evidence, there are certain sensitive things in here that might not become evidentiary and I just don't think ought to be disclosed early on. I request that consideration.

THE COURT: All right. Let me. . .

MR. THOMSON: Your Honor, before he hands me that, I am not sure it is necessary that I receive a copy of that.

THE COURT: All right. It is up to you, Mr. Thomson.

MR. THOMSON: I generally know something about it and it is probably something that is more appropriately kept between counsel and the Defendant.

THE COURT: All right.

MR. THOMSON: So I really. . . If the Court wants to receive it that is fine, but I don't really need it.

THE COURT: I would like to see it.

[287] MR. FISCHEL: Yes, sir. And I appreciate that, Mr. Thomson. I did in large degree speak to this letter to Mr. Thomson. He has a pretty good sense of its contents.

THE COURT: Give me a few moments.

MR. FISCHEL: Yes, sir. Mr. Shaw, I would just point out though the stamp says it came in yesterday. It literally was minutes ago.

MR. SHAW: All right. Thank you.

MR. FISCHEL: Your Honor, that Motion for leave to withdraw, which you are looking at apparently now, I was just given a copy by the Commonwealth. If it was sent to me today it was after I left from Warrenton. I would also say that part of what I was going to suggest to the Court was in discussing this matter with my client, he has asked me to make an affirmative request on his part for the same relief. He is distressed with the problem and would like to have Mr. Snook replaced and other counsel join me.

MR. THOMSON: Your Honor, we received that by FAX probably within the last hour, even though the stamp says the 10th. It should be marked the 11th or 12th. I have had a chance to review it and I gave a copy **[288]** to the defense. It appears that in that Motion, the mitigation group has asked to be withdrawn from the case on page two, paragraph two. And counsel has really left it to the Court apparently in the prayer for relief or left it to Mr. Bell and Mr. Fischel to make the decision on

whether to have him continue in his employ as counsel. Of course, that would then leave it to the Court to decide whether that is an appropriate Motion.

THE COURT: All right. Let me. . . I will go through the letter of May 11, 2000. Let me read the Motion.

All right. I think the first Motion I would like to take up is the Motion to continue the trial. Mr. Fischel, you had filed that Motion and do you want to address it at this time?

MR. FISCHEL: Yes, sir. Your Honor, I can't be very expansive on this other than to say that I have never been involved in a case where I have, I am now witnessing ineffective assistance of counsel in the midst of the case. And to some degree, I have to say to the Court in the same way Mr. Snook says he was prepared to fall on the sword, I guess I have to fall to some degree on a shorter knife because as co-counsel, I guess I should **[289]** have seen what wasn't happening.

But to a large degree, I placed great faith in all of the people who were named, both Mr. Snook and the other two, for the program. They have tremendous reputations though I have never actually worked with any of them directly before. And I just blindly thought everything was going along fine as I was doing my part of our subdivision of the case.

Point being, at this stage, there is no mitigation evidence that can be effectively presented but for a dabbling of it. I can put together some stuff very quickly in a couple of weeks, I am sure, but I don't know that I am going to have school records. There is a question here about a physical problem in terms

of organic brain syndrome and I certainly am not going to have expertise there.

There is just so much that I can't do or won't be able to do, that really without saying too much about how the trial is going to look or how it is going to take place, it strikes me that we are all placed in a position that if the continuance isn't granted, if we are not given the opportunity to do this, this case will come back. And I can't see it not coming back if it is allowed **[290]** to go to trial. I mean, obviously if he is not convicted of capital murder or if the Jury recommends life rather than death if he were convicted of capital murder, it wouldn't come back in that area. But I think that is not a risk that I, as trial counsel, want to take. I am not sure anybody in the room associated with the case with an active role wants to take that risk.

The most fundamental due process requirement of having effective counsel has been denied to him by, not by his own fault, but to a degree I must confess to a little bit of inattention on my part in relying on the role of the counsel who was in here before me and to a large degree I was looking to him, even though there was no designation, I was looking to him as lead counsel since I was joining him after he had been on the case for a while.

I knew I had a problem on Tuesday because that was the 21 day notice requirement to send notice of use of any testing, excuse me, any report of a psychological nature. There is a statutory requirement for that report being filed. When I didn't get the copy of that, that is when I was on the phone and that is why you see the reference to the phone call in that letter. **[291]** But I appreciate and respect Mr. Snook's candor. He told us in that letter

what happened, why it happened and how it happened. I am just at a loss as to it happening and I just don't see how this case can proceed to trial as scheduled without the most egregious violations of the rights as I set forth in the Motion.

There are multiple Constitutional issues implicated. Does this make Mr. Bell take the stand when he doesn't have the obligation to do so? A Sixth Amendment violation, as I have said. A simple due process violation of the Fifth Amendment and, of course, we have comparable Virginia sections that cover that in terms of Article 1, Section 8 and 11. I think that it is just so basic that I am not sure I know what else to say and I apologize to the Court.

THE COURT: Mr. Thomson?

MR. THOMSON: Your Honor, just for the record, we are prepared to go to trial as scheduled. I was notified about the problem through Mr. Fischel and I reviewed all the Motions in the case. Outside of the Court making a personal inquiry of Mr. Snook and the mitigation folks, we simply have to rely on what has been filed with the Court. Generally, these matters are **[292]** handled by making personal inquiry as to whether, questions like whether after the interview there was, in fact, any mitigation evidence at all, although he does reference the possible organic brain disorder.

I would refer the Court back to the first time Mr. Snook came to Court asking for this mitigation group, we opposed it. One of the reasons we opposed it was the fact that under 19.2-264.3:1, which is the section that deals with the Motion for an expert regarding the Defendant's mental status at the time of the offense, et cetera, they were not following that.

He wanted this other group to do it, to develop mitigation evidence outside of a psychiatric profile. And pretty much as I suspected, they are now indicating there is some kind of, in a layman's sort of way, a possible organic brain problem. And so in any event, if they suggest that to counsel, whether it is Mr. Snook or Mr. Fischel, they are going to be duty bound to file a Motion now under 19.2-264.3:1, which would necessitate a continuance.

So, should the Court continue the case, I would ask the Court to schedule an argument on 19.2 now that we have been made aware under 264.1, that there is this specter of some kind of mental disorder that has been **[293]** raised that we have a schedule, so that this psychiatric expert can be appointed, a report can be provided and the appropriate notices followed up upon so that the Commonwealth will have a sufficient amount of time to respond to that if that is going to be used in the trial.

I would be more inclined, at this point, to. . . I think it is kind of hard to take up just the issue of the continuance without taking up this whole issue of whether the Court should relieve the mitigation project of its duties under page two of the Motion by Mr. Snook. But I would ask the Court, and certainly I don't mean to speak for Mr. Fischel, who has been diligent in coming to Winchester and meeting with not only Winchester Police Officers but my office as well to gather evidence, that he be directed by the Court to seek out another investigative tool outside of this project to help them develop the mitigation evidence that they feel is appropriate in the case. I would certainly feel a little bit uneasy about using this group. I know nothing about them. Mr. Fischel says that they have a good reputation but if I were

the Court, I would feel a little bit uneasy given the situation two weeks out of trial that we find ourselves faced with at this point. But certainly, just **[294]** that fact alone, that now Mr. Fischel is on notice that there is a possibility of some kind of disorder that should be looked at by a forensic psychiatrist would necessitate the delay of the case. He needs some time to explore that, interview the witness, take it to a doctor and find out if they need to have a formal evaluation. So before we get into all the rest of it, now that we know that that is out on the table, that certainly would be something I don't think he could accomplish in two weeks.

THE COURT: Mr. Fischel, you have the right to close.

MR. FISCHEL: Yes, Your Honor. Mr. Thomson is absolutely right about the statutory point, Your Honor. I was going to save this to see how the Court ruled, but I might as well put it on the table at this point. Again, reiterating Mr. Bell's request that Mr. Snook's services be terminated, I would also request that the group, the mitigation group's services be terminated.

I have taken the liberty of talking to two attorneys, well known to me, who in both instances I have served as co-counsel with. One, Alex Bouvier, who is in Leesburg is on the list for capital defense counsel. He and I served as co-counsel on a case we both recently had **[295]** in Fauquier County and we have a wonderful working relationship. And in terms of being able to present mitigating evidence, mitigation evidence, he did a spectacular job with the result we had hoped for. I asked him yesterday, I asked of his availability if the Court were so inclined and he equivocated in that while he is

interested, he said he had to (A) clear it with his partner and look at their work load and (B) he had to clear it with his wife, which I understand.

THE COURT: Probably not in that order either.

MR. FISCHEL: Yeah, actually it was in that order. I think he felt if his partner said no he didn't have to ask his wife.

The other option is an attorney right in Warrenton by the name of Mark Williams who is not on the list for capital defense attorneys, although I think, basically, he would qualify. He has handled, I know of three first degree murder cases, two resolved by juries. He has had at least fifteen cases on felony trials. Uniquely, he has been practicing only ten years because he served over twenty years as not only a social worker but the Supervisor for the Fauquier Department of Social **[296]** Services and is well versed in a lot of the issues though I would say undirected, not having had a capital case under his belt. But he is well directed, well versed in the subject matter of what would be necessary in mitigation and frankly, given the work I have done in getting ready for trial on the guilt phase, if we were, I mean I am not done, but if we were given a continuance, I can jump in and have plenty of time to work on the mitigation phase as well and provide Mr. Williams with that direction necessary.

I normally don't walk around tooting this but I would also point out to the Court that in terms of a concern about mitigation and what Mr. Thomson raised about looking somewhere else for the services, if my hands are freed a little bit, which time would free them, I would point out to the Court that I have had extensive experience prior to becoming an

attorney in, as a juvenile probation officer and training in that area as well as being a multiplicity of things which would let me just jump right into the mitigation area.

So with either of those attorneys. . . Mr. Williams indicated his availability and, in fact, said if appointed this afternoon, he wanted to meet with me **[297]** tomorrow morning and get going. So if the Court is (A) inclined to grant the continuance, (B) inclined to change counsel, we have alternatives that we can work on immediately. And frankly, I tried to draft the Motion that I did with a degree of courtesy, but I just don't know how we can do this any other way and I am very upset that we are in this position.

THE COURT: Well, I am sorry that we are in this position as well. I was, I think everyone was counting on the trial commencing on May 30th and as I have already told you I had made arrangements to move the trial to Staunton, if indeed we could not get a jury in Winchester. So all that was in place and ready to go.

It is always difficult to schedule a lengthy trial during the summer months when you have a number of witnesses involved because of the various vacation schedules that come in to play and here we are at the beginning of the summer. So as I said, I wish we weren't in this position either.

I do understand that regardless of whose fault it is, mitigation evidence which can be crucial to the Defendant's case, has not been developed. Mr. Fischel made reference to this in his argument and it is clear to **[298]** me that if I do not give the Defendant the opportunity to develop that evidence before trial that this case will almost certainly come

back to be tried once again, either after appeal or upon habeas corpus. So I think the continuance has to be granted.

Now, as far as the discharge of these mitigation specialist. . . First of all, let me say this. Maybe I did, but I didn't really recall appointing that particular group to be the mitigation specialists. I thought what I had done is simply authorize defense counsel to employ them, that is, I authorized expenditure of public funds to employ them. But regardless, if indeed I need to enter an Order to allow them to withdraw, then I can do that but I didn't think that was really the posture of the case. I thought they were working for you all with the bill being sent to the Commonwealth. I thought that was the situation.

But my viewpoint on that, Mr. Fischel, is you, as defense counsel, and whoever your co-counsel may be, can decide who to employ. Now, originally this Motion came before me I too thought that you were making a Motion for a mental health expert under the Statute that Mr. Thomson has cited. And, of course, there was argument at **[299]** the time that it was not really under that Statute. It was, these people help develop mitigation evidence beyond psychiatric and psychological evidence. I do know that in two other capital murder cases in which I have been involved, that the mental health experts, themselves once appointed, had asked for this type of assistance. The reason I allowed the funds to, allowed the funds for their employment is that it was cost effective to the Commonwealth. Since the Commonwealth is footing the bill on all of this, there was a question of do I have the attorneys or the psychologists do this work at the rate that we pay

them or do I have someone who can do it for a lesser rate and it just made sense to employ the other people. And it still makes sense.

Now, to the extent, Mr. Fischel, you can do the development of the mitigation evidence yourself, I certainly don't foreclose that possibility, but I am not to the point of saying okay, that is it, I am not going to let you have the money to hire a mitigation specialist.

It seems to me that, if indeed, you do wish to employ someone else in this regard, Mr. Fischel, I would again require you to submit an estimate of costs to the Court and that be considered all over again, but I am **[300]** not shutting the door to it. From what I have read and as Mr. Thomson also pointed out, there may be a need now for a mental health expert as well and that is under the Statute so there is no question about you being entitled to that.

As far as Mr. Snook's Motion to withdraw, let me say that Mr. Snook has a very good reputation. I have not had a lot of contact with him through the years but I have had some and I have always been impressed with his abilities and his intellect and his diligence. And he has been very candid to his letter to the Court accepting responsibility for dropping the ball, so to speak.

So I guess my question, Mr. Fischel, and I may know the answer to this, but if we continue the case and get things back on track, is it necessary for Mr. Snook to withdraw?

MR. FISCHEL: It is Mr. Bell's request, Your Honor.

THE COURT: I understand.

MR. FISCHEL: And given the problems that I have encountered and knowing the two other attorneys as I do, despite my personal fondness for Mr. Snook, I just don't want to risk what is involved given the high stakes **[301]** in this case. So it is, in fact, my Motion as well and I say that reluctantly but out of necessity and obligation to my client.

THE COURT: Let me make this inquiry of you. You have mentioned two attorneys, one being located in Warrenton. Mr. Williams, I believe.

MR. FISCHEL: Mr. Williams. Yes, sir.

THE COURT: Did you say that he is not on the approved list?

MR. FISCHEL: He is not on the approved list but the Statute allows you to approve, appoint someone who is not on the list if. . .

THE COURT: I know that. I am just a little leery of doing it.

MR. FISCHEL: I understand and I recommend him not because I know him but because we have served in many instances as co-counsel before. And I have had the opportunity on probably twenty instances to actually appoint him as a guardian ad litem when I have been in Judge Payne's place and he does a superior job in representing his clients. And also, by coincidence or by design in terms of my thinking, with the various social and mental health issues, he has got an extra knowledge **[302]** there. I think that with my intent of having him focus on the mitigation aspects of it, the Court could be assured that the trial aspect and the procedural aspects will be under my supervision and we will just move those along.

THE COURT: He will be willing to serve as co-counsel with your being lead counsel?

MR. FISCHEL: Yes, sir.

THE COURT: What I would like to do, Mr. Fischel, is I will take Mr. Snook's Motion to withdraw under advisement. In the meantime, I ask that you get something from Mr. Williams detailing his experience in the criminal justice system and I also would like to have something, a letter from you as well, with your observations. If I am going to appoint someone who is not on the approved list I want to make sure it is well documented that the person is qualified.

MR. FISCHEL: Yes, sir.

THE COURT: For obvious reasons.

MR. FISCHEL: Yes, sir.

THE COURT: So, could you do that? Ask him for that and. . .

MR. FISCHEL: I can do that and I will also suggest that he go ahead and apply because I. . .

[303] THE COURT: I am sorry?

MR. FISCHEL: I will ask him to go ahead and apply to the Public Defender Commission. . .

THE COURT: That would be very helpful as well.

MR. FISCHEL: . . .because I believe he is qualified.

THE COURT: That would be very helpful.

MR. FISCHEL: He just hasn't done it.

THE COURT: And then you can supplement what he submits with your own comments along the line with what you have shared with me today.

MR. FISCHEL: Thank you.

THE CLERK: What is Mr. Williams' first name?

MR. FISCHEL: Mark. M-A-R-K.

THE COURT: That name sounds familiar to me for some reason and I don't know why. But anyway.

I guess the awkward posture we are at now is if I am considering substituting someone else as co-counsel in this case, I don't know that we can set a new trial date today unless you think we can set it and have him work towards that.

[304] MR. FISCHEL: What I was going to suggest, Your Honor, we are scheduled to be back here anyway on May 22nd for what was going to be any final Motions to be argued, et cetera.

THE COURT: Right.

MR. FISCHEL: I would suggest we simply carry the case over till then and use it as a control date, not for any great length or purpose other than having you make a decision before then as to counsel, have Mr. Williams or whomever appear and from there, everybody with calendars can go ahead and set new dates and work backwards in terms of deadlines for filing Motions and that sort of thing.

THE COURT: You think on the 22nd of May then we would be in a position to set a new trial date?

MR. FISCHEL: We will have materials faxed to you Monday or Tuesday and you can look at that and do what you need to do.

THE COURT: Mr. Thomson?

MR. THOMSON: I think the Court will be out of Town next week.

THE COURT: I will because we have our mandatory judicial conference next week. However,

if you **[305]** will FAX these things to my office in Woodstock, my secretary will be able to get them to me in Richmond and I can deal with this while I am at the conference.

MR. THOMSON: Your Honor, I have no objection to the Court. It might be more helpful if the Court within the next week acts on the Motion to withdraw and also appoints counsel, just notifies us by phone as to the Court's actions unless the Court feels we need a hearing on those things. And that way, both counsel can be here on May 22nd so we can set the trial date. I had. . .

THE COURT: My. . . I am sorry.

MR. THOMSON: I had heard from I think it was Mr. Fischel that he was looking for dates in September, so we took the liberty to go ahead and contact all of our witnesses that are professionals, scientists and whatever, and so we have already started the process of trying to identify a date in September where we could hear this case.

THE COURT: All right.

MR. THOMSON: And if Mr. Fischel could also peruse the evidence provided by the mitigation folks with regard to this possible psychiatric problem, we could. . . **[306]** And if he doesn't feel he can do it by the 22nd, certainly on a scheduling date shortly after that, get that Motion filed with the Court so we can move along in all due haste. Because that is going to involve contacting a professional and going through the summer months having him evaluated. And, of course, we are entitled to have an evaluation too if it is going to be used in Court. So that is a lengthy procedure.

THE COURT: All right. Well, your suggestion is a good one that we hold that date to get things back on track. I am taking Mr. Snook's Motion under advisement. I will deal with that this coming week and I know you have my FAX number, Mr. Fischel, since I received a FAX from you yesterday. So FAX the information that I have requested to me in Woodstock and I will communicate to you all during this next week, most likely, simply by telephone call and let you know what I am doing. Then we will come back here on May 22nd with the purpose of setting a new trial date and dealing with any other preliminary Motions that you may have, which may include something along the lines of what Mr. Thomson is talking about.

Mr. Fischel, I am going to put the burden **[307]** on you to determine whether you think that we need an Order releasing these mitigation specialists that have been hired.

MR. FISCHEL: I don't think we do, Your Honor.

THE COURT: If you do, if you can prepare a brief Order and submit it I will sign it because I really think it is up to you. Again, if you are going to employ somebody else in that line of work, I do ask that you have them submit an estimate as to the costs and I will deal with it at that time.

I take it that we should no bill if, a very small bill, if any, from this group. I understand that maybe one of them did interview Mr. Bell here in Winchester at one point. The question is whether I authorize payment on that anyway, but that is another issue. But there has been no expenditure of funds for the mitigation specialists as of this date anyway. Okay.

Now, Mr. Fischel, before this most recent Motion, you had filed another Motion concerning the evidence of unadjudicated conduct. Is it premature to deal with that now or on the 22nd?

MR. FISCHEL: Yes. Well, maybe not the **[308]** 22nd but today because to be candid, I didn't even focus on that this so disrupted what I was doing. Frankly, I think that when we, the critical part of that was that there was a time problem let alone the arguments about its use. The time problem, obviously, has just been mooted out. So I would say it could be lumped with a variety of other Motions when we would have a bevy to deal with rather than just picking it out on the 22nd. It can wait. We can deal with it. We might find that what our investigation reveals about it doesn't trouble us to the extent that it looks like on paper. So I would say just use the 22nd for a control date and we can work everything from there.

THE COURT: All right. Is there anything else, Mr. Fischel?

MR. FISCHEL: Nothing else. Thank you, Your Honor.

THE COURT: Mr. Thomson?

MR. THOMSON: No, Your Honor.

THE CLERK: So you did sustain the Motion for a continuance or at least the trial date?

THE COURT: Yes. The Motion to continue the trial is granted.

[309] THE CLERK: Okay. What time on the 22nd?

THE COURT: Nine o'clock.

MR. FISCHEL: Let's see. No, we have it. . .

THE CLERK: Are you going to be here that day with us?

THE COURT: Judge Wetsel is planning on being in Warren on that day.

THE CLERK: Yes. So you all switched. Okay.

THE COURT: Excuse me. Is it later than that?

MR. FISCHEL: Is it at 2:00 on the 22nd, sir.

THE COURT: Oh, I am sorry.

THE CLERK: But you are going to be here all day for us?

THE COURT: Yes.

THE CLERK: Okay.

THE COURT: That is fine. You say it is scheduled at 2:00? I didn't write that down.

MR. FISCHEL: Scheduled at 2:00, sir.

THE COURT: Okay. All right. So this case then is scheduled for 2:00 on May 22nd of 2000. The **[310]** Defendant is remanded to the custody of the Sheriff and we will now recess.

END OF PROCEEDINGS

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

COMMONWEALTH
OF VIRGINIA

VS. DOCKET NO. CR99000478
CR99000489
CR00000002
CR00000003

EDWARD N. BELL

CITY OF WINCHESTER CIRCUIT COURT
WINCHESTER-FREDERICK JUDICIAL CTR
5 NORTH KENT STREET, ROOM 3-D
WINCHESTER, VIRGINIA 22601
DATE: OCTOBER 31, 2000

The above-entitled matter came on to be heard for the purpose of Motions at 2:00 o'clock, P.M.

BEFORE:

THE HONORABLE DENNIS L. HUPP
presiding

* * *

[449]

* * *

MR. FISCHEL: All right, Your Honor. Those are the agreed matters. And, then the two matters, I believe, left pending are the Motion to Reconsider on the Appointment of an expert, and the Motion for Appointment of other experts.

My understanding is that Mr. Thomson isn't going to take a position on those as he hasn't in the past. And, it is between us and the Court.

I will argue the Motion to Reconsider as to Mr. Aiken. And, I have set it forth in writing for the Court. **[450]** But, the principle argument in the use of this gentleman as it is set forth in the Motion to Reconsider, is that both in terms of our preparation and the need for a consultant and in terms of the potential presentation of evidence as it relates to future dangerousness, we are asserting the need to bring him forth as it may arise in the issue of rebutting the Commonwealth's case of future dangerousness.

And, to leave us with just asking the jury to conjure certain things is not sufficient in the way of rebutting the Commonwealth's evidence. We need someone who can testify as to certain things. And, I may not even know all what they are yet because we haven't had the opportunity to consult with the gentleman. And, it may turn out that he doesn't help us.

But, we certainly first need him as a consultant on how to prepare for that phase of the trial, and secondly need him as a possible rebuttal witness to what the Commonwealth may well present.

And, for those reasons, we respectfully request the Court reconsider its ruling previously where you

denied the use of this expert. And, give us a full range of resources by which we can present our case.

[451] THE COURT: When I denied the Motion the first time I cited a case, Cheques vs. Commonwealth, 257 Virginia 292, 1999 case. I went back and read the portion of that case dealing with this issue again when I saw this Motion last week.

Mr. Fischel, it seems to me that that case is directly on point, that this type of evidence is not admissible.

I mean, I realize your argument is if you give the Defendant life in prison that he is not dangerous to society because he is going to be locked. And, that argument can be made to the jury. But, the Supreme Court of Virginia has ruled that the details of the incarceration describing prison life is not admissible. That is the way I read that case. Do you have a different read on that case?

MR. FISCHEL: No, but I think the point is: It is discretionary. It is not a mandatory ruling. So, we are asking the Court to exercise the discretion and simply give us that opportunity.

THE COURT: All right. I am going to stand by my ruling and deny the Motion and note your exception.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

VS. DOCKET NO. 99CR478
2000CR2

EDWARD NATHANIEL BELL

WINCHESTER CIRCUIT COURT
ROOM 3-D
WINCHESTER/FREDERICK
JUDICIAL CTR
WINCHESTER, VIRGINIA 22601
DATE: JANUARY 18, 2001

THE ABOVE-ENTITLED MATTER CAME ON TO BE HEARD FOR THE PURPOSE OF DAY TWO OF TRIAL, AT 9:00 O'CLOCK, A.M.,

BEFORE:

THE HONORABLE DENNIS L. HUPP
presiding

* * *

[1236]

* * *

DEPUTY JEFF BOWERMAN

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. THOMSON

Q State your full name

A Jeffrey Bowerman **[1237]**

Q What is your current occupation

A Deputy Sheriff of Frederick County, Virginia.

Q Directing your attention to August of 1999, where were you employed then?

A City of Winchester. Police officer.

Q And, did you know Officer Timbrook?

A Yes.

Q On the 8th day of August 1999, did you respond to a location in the City of Winchester where Officer Timbrook was?

A That is correct.

Q Where was that?

A This is the 1000 block from North Braddock Street.

Q Which block was it?

A 1000 Block. 1000 Block of North Braddock of Street.

Q Were you with him as a partner that night, or just working the shift with him?

A Just working the shift.

Q Where were you when you first received the call?

A I was on the North Loudoun Street area.

Q How long take you to get to the scene once you [1238] received the call?

A Probably three or four minutes at the most.

Q When you arrived there, did you observe Officer Timbrook?

A Yes. I did.

Q Did you observe Eddie Bell?

A Yes. I did.

Q Where were they?

A They were in the parking lot. Town house apartment complex. They were in the parking lot.

Q Was anybody else present in the way of law enforcement?

A No, sir.

Q Just the two of you?

A Yes.

Q You were there for backup, then, I take it?

A That is correct. Yes.

Q What occurred between the two of them?

A When I arrived at the scene I saw Sergeant Timbrook and Mr. Bell in the parking lot. As I got out of my car I could hear Mr. Bell being very belligerent and loud towards Sergeant Timbrook. [1239]

Q What was he saying to him?

A He was accusing Sergeant Timbrook of always harassing him and out to get him, and always trying search him for guns and drugs. Basically, harassing him.

Q And, what was Officer Timbrook doing? Can the jury hear his response?

(Having trouble.)

Q Okay. Would you repeat what you said, sir?

A Mr. Bell was being loud and belligerent towards Sergeant Timbrook.

MR. THOMSON: I am sorry, Judge. We can't hear him. We will have to turn the mic up.

BY MR. THOMSON:

Q You exited your vehicle and what did you hear?

A I could hear Mr. Bell being very belligerent and loud towards Sergeant Timbrook.

Q What was he saying to Sergeant Timbrook?

A He was teasing him and harassing him and stopping him every time he had a chance, checking him for guns and drugs.

Q What was Sergeant Timbrook doing in response to him while he was saying that to him? **[1240]**

A He was trying to get him to calm down and explain why he was speaking to him on that incident... why he approached him.

Q Why he was there?

A That is correct.

Q Do you know where he was prior to his encounter with Mr. Bell?

A He was in the area on foot conducting surveillance.

Q And, as part of that, he was approaching Mr. Bell?

A That is correct.

Q Did the situation get calmed down?

A After a few minutes.

Q And, where did each one of them... Where did Mr. Bell go after the incident?

A He left the area in a vehicle.

Q Was the area where he was, was that where he was living at the time?

A I don't believe so.

Q Okay. And, did the Sergeant leave?

A Yes, sir.

Q And, you left in your car? **[1241]**

A That is correct.

Q The scene was clear?

A It was cleared. Yes, sir.

MR. THOMSON: That is all of the questions I have.

CROSS EXAMINATION

BY MR. FISCHEL

Q Did you ever have any conversations with Sergeant Timbrook prior to this incident about Mr. Bell?

A Yes, sir.

Q And, as a result were you aware that Sergeant Timbrook had sort of targeted him?

A No, sir.

Q When you arrived at the scene, did you observe Mr. Bell being patted down?

A Yes, sir.

Q Did it reveal any illegal firearms?

A No, sir.

Q Did it reveal any firearms?

A No, sir. **[1242]**

Q Did it reveal any illegally concealed weapons of any sort?

A No, sir.

Q Did it reveal any narcotics or illegal substances?

A No, sir.

Q In other words, Mr. Bell was not seemingly committing any crimes; was he?

A As far as possession of weapons and narcotics, no.

Q And, he wasn't arrested for anything; was he?

A No.

Q Simply stopped on foot or in his vehicle by Sergeant Timbrook? Correct?

A That is correct.

Q Where he was, was he lawfully there?

A It was private property. He wasn't charged with trespassing. I don't now why he was there.

Q There was no complaint of trespass; was there?

A No. Responded to a domestic.

Q No charges, no weapons, no drugs, no nothing?

A That is correct.

MR. FISCHEL: Thank you.

REDIRECT EXAMINATION

BY THOMSON:

Q You said you responded to a domestic? **[1243]**

A Yes.

Q What does that mean?

A I was dispatched to back Sergeant Timbrook up with a confrontation between a male and female in the parking lot.

Q The parking lot that you got the call to go to was the one were Eddie Bell was with Sergeant Timbrook?

A Yes.

Q Where was the female?

A At that time, she was inside the town house.

Q She was kept apart from Mr. Bell?

A That is normal procedure to separate them.

Q So, Sergeant Timbrook elected not to place any charges at that point?

Q Once he investigated the scene?

A That is correct.

MR. THOMSON: All right. That is all.

THE COURT: Recross?

MR. FISCHEL: Subject to recall. That is all.

THE COURT: You may step down and you are subject to recall.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

VS. DOCKET NUMBERS. 99CR478, 489
2000CR2, 3

EDWARD NATHANIEL BELL

WINCHESTER CIRCUIT COURT
ROOM 3-D
WINCHESTER/FREDERICK
JUDICIAL CTR
WINCHESTER, VIRGINIA 22601
DATE: JANUARY 19, 2001

THE ABOVE-ENTITLED MATTER CAME ON TO BE HEARD FOR THE PURPOSE OF DAY THREE OF TRIAL, AT 9:00 O'CLOCK, A.M.,

BEFORE:

THE HONORABLE DENNIS L. HUPP
presiding

* * *

[1283]

* * *

BILLIE JO SWARTZ

retakes the stand,

DIRECT-EXAMINATION

BY MR. THOMSON: [1284]

Q State your full name for the Court, please, ma'am.

A Billie Jo Swart.

Q How old are you, Ms. Swartz?

A Twenty-three.

Q Where did you grow up?

A Here in Winchester, Virginia.

Q Do you know Edward Bell?

A Yes. I do.

Q Did you know him in the summer of 1999?

A Yes, sir.

Q Did you ever go target practicing with him?

A Yes, sir.

Q Would you tell the jury how that would occur?

A How that occurred. Well, he would come by my grandparents' lot. We used to see each other. That is how this started out.

Q Did you have a relationship with him?

A Yes, sir. Go target practicing.

Q Where would you go?

A On 522.

Q 522 west?

A Up by my grandmother's. 522 North [1285]

Q 522 North?

A Uh, huh.

Q Who would go target practicing with you?

A Lamont and Montel.

Q Lamont and Montel?

A Uh, huh.

Q Were they friends of Mr. Bells?

A Yes.

Q What kind of weapons would you use to target practice?

A .9 millimeter.

Q .9 millimeter?

A Uh, huh.

Q Did that belong to Mr. Bell?

A Yes. It did.

Q Did you watch him target practice?

A Yes. I did.

Q Was he a good shot?

A Yes.

Q How good?

A Very good.

Q Would he hit the bulls eye on the targets?

A Sometimes. **[1286]**

Q Did you see him load the weapon?

A Yes.

THE COURT: What kind of gun .9 millimeter.

THE WITNESS: Yes.

BY MR. THOMSON:

Q Was it a handgun?

A Yes. It was a handgun.

Q Did he carry that weapon with him all the time?

A Yes. He did.

Q Did he ever carry on his person?

A Excuse me?

Q Did he carry it on his body?

A Yes. Sometimes underneath the seat of car or just have it on him.

Q And, was when you were going to and from target practice

A Yes.

Q Did he ever mention Sergeant Timbrook to you?

A Just a couple times. Just saying that he "harassed me," and stuff like that. But, nothing major like he was going to kill him or nothing like that. No.

Q Said that Sergeant Timbrook was harassing him?

A Yeah. He took a gun away from him one time. [1287]

Q He did tell you that?

A Yeah.

Q When he would mentioned Sergeant Timbrook, was he drinking?

A Uh, huh.

Q Did he ever talk to you about your testimony today?

A No.

Q Did he talk to you today about it?

A Yes.

MR. WILLIAMS: Objection, Your Honor. She just answered that question.

THE COURT: She did answer the question. I will let you follow up.

BY MR. THOMSON:

Q Did he talk to you today about it?

A Yes.

Q Where was that?

A When I was in the holding cell right beside him. I came about 8:00 o'clock when the jail transported me from the Winchester Regional Jail. That had me and another person in there with me. And, then we seen Mr. Bell come through and put him right beside the holding cell where we [1288] was.

Q Did Mr. Bell say anything to you this morning.

A Yes. He did.

Q What did he tell you?

A He said, "Don't testify." And, he called me a lying bitch. And he told me he would kill me.

Q Okay. Ms. Swartz, you are being held on a probation violation. I understand this just occurred?

A Yes, sir.

Q Where were you prior to the probation violation occurring?

A I was in Boxwood treatment center in Culpeper, Virginia.

Q Okay. And, you left that treatment center?

A I got discharged for getting into an argument with another peer there. She was a female. They discharged me for getting into an argument with a female there.

Q Moved on to Winchester?

A Yes, sir. Packed my stuff up yesterday evening about 10:30. Called my grandparents and see if they could come and get me. Since I wasn't a resident staying there, then I couldn't stay on the

property. So, my grandparents **[1289]** paid $100 for a cab from Culpeper to Winchester, Virginia to my home on 1124 Purcell Lane in Winchester.

Q Has anybody offered you anything for your testimony today?

A No, sir. They haven't.

Q Were you told to tell the jury the truth?

A Yes. Nothing but the truth.

Q And you haven't received any consideration from any official, whatsoever, on this testimony; have you?

A No, I haven't.

MR. THOMSON: This is all of the questions I have. Thank you.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Ms. Swartz, have you ever been convicted of a felony?

A Yes. I have.

Q How many?

A Nine.

Q Nine felonies?

A Nine at one time.

Q What were those felonies?

A Credit Card fraud, check fraud, foregery, **[1290]** uttering, lying to a police officer, taking money under false pretenses and then didn't show up for court a couple times. I know it was nine all together.

Q Nine felonies all together?

A Yes. One day they caught me at Montgomery Wards. Officer. Rice had nine felonies, but he dropped it down to four.

Q Oh, he dropped them all down to four for you?

A Uh, huh. Actually 2.

Q All right. You are on probation now? Is that right?

A Yes. I get off paper sometime in May.

Q How much time did you have over your head, Ms. Swartz?

A How much time. Well, I had 71 years. Broke it down to 14 to run concurrent. So, I end up with four. So, two years on probation as long as I complete the Women's Diversion Program. I didn't complete the Women's Division Program. So, I have been incarcerated.

Q If they put you back in the penitentiary, how much time do you have on you?

A Just to May. I haven't brought no brand new charges back since my prior charges. [1291]

Q Not asking you ...May I am not being clear. How much suspended time do you have.

A Two years.

Q Two years?

A Yes.

Q If you violated probation, as they have alleged right now, you could go to jail for two years?

A No. Until May of this year. I have been going in and out of jail for probation violation for dirty urine or alcohol. Haven't been no brand new charges. Just been going in and out of there for two years.

Q You have still got time over your head?

A Six months.

Q You said he made a threat to you. Is it true that what he said to you in that holding cell was "My lawyer finds out your lying on the stand, he is going to get you for perjury?"

A No, sir. He did not.

Q He didn't say that?

A No, he didn't.

Q Okay. Have you ever asked a correctional officer out at the Winchester Detention Center to ask Mr. Bell to write you a letter? **[1292]**

A No, I haven't.

Q Never?

A No.

Q Absolutely not?

A No. I seen Mr. Bell in the hallway when he is in the gym, because I was a trustee there. Okay.

Q Never asked a guard to ask Mr. Bell to "send me write me or write me while we are in here"?

A No. I did not.

Q You are certain of that?

A Yes. I am certain of that.

Q Okay. All right. Now, this information that Mr. Thomson is asking you, did you come to the police with that information after the shooting?

A No. I was incarcerated, myself.

Q You were incarcerated at that time?

A Yes.

Q Did you let somebody know you had information? How did the police end up seeing you?

A He just come and asked me questions. And, I answered their questions under the best ability of what I knew.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

VS. DOCKET NUMBERS. 99CR478, 489
2000CR2, 3

EDWARD NATHANIEL BELL

WINCHESTER CIRCUIT COURT
ROOM 3-D
WINCHESTER/FREDERICK
JUDICIAL CTR
WINCHESTER, VIRGINIA 22601
DATE: JANUARY 26, 2001

THE ABOVE-ENTITLED MATTER CAME ON TO BE HEARD FOR THE PURPOSE OF DAY EIGHT OF TRIAL, AT 9:00 O'CLOCK, A.M.,

BEFORE:

THE HONORABLE DENNIS L. HUPP
presiding

* * *

[2303]

* * *

THE COURT: Ladies and gentlemen, we are ready now to begin the penalty phase of the trial with respect to the capital murder conviction.

As you have been told during the very beginning of the trial during the voir dire examination, the punishment for capital murder is either death or life in the prison without parole.

Before you can impose the death penalty, the Commonwealth must prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the Defendant or of the circumstances surrounding the commission of the offense for which he is on trial that he would commit criminal acts of violence that would constitute a continuing serious threat to society in the future.

[2304] At this time, the Commonwealth will present evidence attempting to support that proposition. And, you will also hear testimony from the victims. And, the victims would be family members of Mr. Timbrook.

The Defendant will also have the opportunity to put on witnesses at this stage in mitigation. We are about to embark upon that at that now. Anything further, gentlemen?

MR. THOMSON: No, sir.

MR. FISCHEL: No, sir.

THE COURT: All right. Mr. Thomson, call your first witness?

MR. THOMSON: Deke Walker. West Virginia State Trooper. Deke Walker.

WHEREUPON,

DEKE WALKER

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q State your full name, please, sir. **[2305]**

A Sergeant W. D. Walker.

Q And, what is your occupation?

A I am with the West Virginia State Police

Q How long been a law enforcement officer?

A Twenty two and half years.

Q In connection with your duties as a West Virginia State Trooper, is that what you call yourselves?

A Yes, sir.

Q In 1999, did you have occasion to observe the Defendant?

A Yes, sir. I did.

Q Describe the circumstances for the jury, please, sir?

A I was on routine patrol. I was running radar on the Route 340 Bypass. I was traveling northbound on the Route 340 Bypass. And, I observed the Defendant. . .

Q Where was this? Can you tell us the approximate location where you were in relation to a town?

A Would be south of Charles Town West Virginia. **[2306]**

Q Go ahead. Thank you.

A I observed the Defendant, Mr. Bell, traveling southbound on the Bypass. He was in a white Volkswagon. The speed limit on that roadway is 60 miles per hour, and I clocked him at 84.

Q Okay. So, what did you do once you clocked him at 84?

A I crossed the median and then gave pursuit. I pulled him over, approximately, a mile and half from where I actually clocked him at.

Q Was anybody in the vehicle with him?

A No, sir. He was alone.

Q Did you request his driver's license and registration card?

A Yes. I did.

Q What happened next?

A He gave me a registration card for the vehicle. The vehicle did not come back to him. It came back to a female subject. I believe her name was Karen Washington. He told me he did not have his drivers license in his possession.

Q What happened next?

A Okay. I asked him for his name. Wilbert **[2307]** Aflac. I could not totally understand the way he was talking. So, I asked him to write the name down. He wrote down the name Wilbert Aflac and a date of birth. Advised me that he had a Maryland Driver's license. That he lived in the Silver Spring area.

Q Then what happened?

A At that point, I went back to my cruiser and requested a license check for the Defendant.

Q Through the State of Maryland?

A Through the State of Maryland. When I ran it, it came back "not on file". Since the car that he was operating had a Virginia tag, I also ran it through the State of Virginia. Didn't come back anything on that either.

I finished writing out the citation and walked back up to the vehicle and started explaining the ticket to Mr. Bell. When I went through the part to explain how to take care of the ticket, that he needed to contact the court in Jefferson County about the citation. They would tell him what the fine was and he could either mail it in or ask for hearing.

Then I asked for him to sign the bottom of the ticket with his name. When he signed the bottom **[2308]** of the ticket he signed it "Edward Bell".

Q You noticed that signature?

A Yes, sir. I did.

Q What did you do in response to that?

A At that point, I asked him to get out of the vehicle there. He had given me the name of Wilbert Aflac but signed Edward Bell.

I got him out of the vehicle. Decided to pat him down to see if he had any weapons on him at that time. Had his hands on top of the vehicle. He kept on taking his hands off the vehicle. I did take a utility knife and a folding knife from the gentleman. I told him I was going to put him under arrest for giving false information. As I went for my handcuffs, he broke away and ran. Ran across the front of his vehicle and then up across a hill and across two fences.

I pursued to the fence line and went back to my vehicle to ask for assistance.

Q You stated that you took two knives off him?

A Yes, sir. A utility and a folding blade knife.

Q What do you mean "a folding blade knife"? **[2309]**

A Well, just a knife with a handled and the blade folds into the handle.

Q Where were they?

A They were in his pockets, but at this point I don't remember which pockets they were.

Q Okay. So, you pursued him for a short period of time?

A On foot. He ran up over the hill.

Q Were you giving him the command to stop?

A Yes. I was.

Q You returned to your patrol vehicle?

A Yes, sir. I did.

Q And, you broadcasted for help?

A Yes. I did.

Q What happened? Did you get help?

A Yes, sir. In my unit, also have a dog unit working with me. Both of us were working the roadway that day. He came. And some officers from Charles Town State Police Detachment, Charles Town City Police, and Sheriff's Department of Jefferson County came to assist.

Q All right. Maryland State Police Helicopter? **[2310]**

A Yes, sir. The Maryland State Police Helicopter also came.

Q And, was a perimeter established?

A Yes, sir. There was.

Q What happened next?

A It took us approximately an hour and a half to locate Mr. Bell, but he was located in the corn field off of Cave Road.

Q Was he taken into custody?

A Yes, sir. He was.

Q How did he identify himself at that point?

A I am not exactly sure. I am not the one who actually arrested him at that point. But, when we searched him further and got his wallet out of him there, he had a Virginia Id card with the name of Edward Nathaniel Bell on it.

Q And, the results of this situation was he was charged; correct?

A Sir?

Q He was charged as a result. . . .

A Yes. He was charged with fleeing and for giving false information, as well as the speeding charges and not having a driver's license.

[2311] MR. THOMSON: Your Honor, at this time, I believe we do need to move the admission of all of the previous conviction orders that we had offered in the sentencing phase. So, I will go ahead and offer those.

THE COURT: Well, they are an exhibit in the case. The Exhibit 300 is in evidence at this stage, as well.

MR. THOMSON: That is all questions at this time.

THE COURT: Would you describe for the jury what a utility knife is, in case they don't know what it is? What do you mean by that?

THE WITNESS: Small blade that people use to cut like carpet. The blade goes back into the handle.

It has a small lever on the top that the blade will come out.

CROSS-EXAMINATION

BY MR. FISCHEL:

Q Sergeant, did you find any. . . Was Mr. Bell charged with possessing any illegal weapons?

A No, sir. He was not.

Q Was he charged with possession of any **[2312]** concealed weapons?

A No, sir. He was not.

Q Was the vehicle searched after he took flight?

A Yes, sir. It was.

Q Did you find any illegal weapons in the vehicle?

A No, sir. Did not.

Q Any other weapons in the vehicle?

A No, sir. Was not.

Q Any illegal drugs?

A No, sir.

Q Did he assault you in any way in fleeing or did he just run away?

A Do you mean, did he swing at me, or hit me?

Q Yes.

A He was flailing with his arms, pulling away, trying to get away.

Q Struggling to get away?

A Yes. Struggling to get away.

Q Struggling to get away but not striking at you?

A No. **[2313]**

Q So, he was not violent to you other than trying to separate?

A I guess in the way of him trying to get away you would consider that violent.

Q But, you did not charge him with assault and battery; did you?

A No. Did not charge him with assault and battery.

Q Are you familiar with the security arrangements such at a super maximum...

MR. THOMSON: I am going to object to that, Your Honor.

THE COURT: Isn't that Chericks, Mr. Fischel?

MR. FISCHEL: It might be, but if he knows the answer, I think he can testify to what he knows. I will ask it differently.

BY MR. FISCHEL;

Q Based upon your 22 1/2 years experience, is there more or less security at prison than on the side of the road?

A Prison be a whole lot more secure.

MR. FISCHEL: Thank you.

[2314] MR. THOMSON: I have redirect based on that question, which I believe is outside the scope of our examination.

THE COURT: Just for the record, so my question to Mr. Fischel is clear, I was citing Chericks versus Commonwealth, which is a Supreme Court Case in Virginia.

BY MR. THOMSON:

Q Are you aware that there is violence in the prison system, sir

A Yes, sir.

MR. THOMSON: All the questions at this time.

THE COURT: Excused. You may leave.

MR. THOMSON: West Virginia State Trooper Joe Adams.

WHEREUPON,

TROOPER JOE ADAMS

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. THOMSON: **[2315]**

Q State your name, please, sir.

A State your name, sir.

A Joseph Robert Adams.

Q And, your occupation please, sir?

A West Virginia State Trooper.

Q And, your rank in that organization, sir?

A I am a Sergeant.

Q Directing your attention to Sept 12, 1999, in your capacity as a State Trooper did you see the Defendant?

Q Yes, sir.

Q Where was that?

A In Joshua Gardens in Berkeley County. O

Q And, in what capacity were you operating as a law enforcement officer then?

A The complex that he was in is Joshua Gardens, Berkeley and Roberts Gardens. It is a housing apartment unit.

Q Is it considered a high drug area?

A Yes. Sir. During that summer, the State Police went in and kind of adopted that area from that detachment. We had done foot patrols and was trying every chance we could to get into there and

[2316] patrol the area. We would do foot patrols and watch around buildings try to catch crack cocaine drug dealers.

Q Okay. And, in connection with that duty,

Were you operating in uniform and were you operating in a marked car?

A No, sir. That day, that night I was in uniform. I was in an unmarked car patrolling the gardens.

THE COURT: You say you were wearing your uniform?

THE WITNESS: Yes, sir.

BY MR. THOMSON:

Q But, your car was unmarked?

A Yes, sir.

Q Where first observe the Defendant?

A I was entering Joshua Gardens, and there was a black car pulled up and the Defendant was talking to, I presume, the driver. It was on the driver's side of the car.

Q What did he do next?

A As I went around Joshua Gardens, has a big loop. He stood up and locked at me and started [2317] walking towards the back of the car, towards the apartment building. As I got around the loop, I was watching him. He walked back towards the car after he saw I was going around.

Then, when I came back around the loop, I started to go out, I went around and turned around and was going to do another pass by the car. He saw me again, and started walking back away from the car.

Q What do at that point?

A Suspicious activity to me. It is a high drug area. So, I pulled up in front of the car and got out. He was at the back of the car. I said, "Hey buddy, could I talk to you for a minute?"

Engaged him in conversation asked if he lived around there. He said he didn't live there. Asked him what he was doing there. He said he was there to visit a friend named Manny Moo. His real name is Manny Armstead Craig, which I have had passed dealings with.

He said the guys in the black car asked for directions. So, I asked him to wait a minute. Then, I went over to the black car and asked them. They said that Mr. Bell had asked them for directions. **[2318]**

Q What did you do next with regard to Mr. Bell?

A At that point, I advised him I wanted to pat him down to make sure he wasn't carrying weapons, because a month prior to that I had been in two incidents where ...

MR. FISCHEL: Objection to what happened a month prior.

THE COURT: Sustained. You don't have to give a reason for it. You did a pat down?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead.

BY MR. THOMSON;

A I did a pat down, and in his pocket when I was patting him down, I felt with my fingers what I felt...on the outside of his pocket, what I felt to believe to be ammunition. So, at that time, I asked him if I could go ahead and search him. He said, "Yes."

I put him up against the car and asked him to put his hands up on the car and I proceeded to pat him down.

Q What did you find, sir? **[2319]**

A Five .38 caliber rounds in a plastic zip lock sandwich baggy.

MR. THOMSON: All of the questions I have. Thank you.

CROSS EXAMINATION.

BY MR. FISCHEL:

Q Is there anything illegal about possession those rounds?

A No, sir.

Q Any charges placed?

A No, sir.

Q Was he cooperative?

A Yes, sir.

Q Attack you in any way?

A No, sir.

Q Did you arrest him for anything?

A No, sir.

Q He was free to go after he cooperated with you?

A Yes, sir. I showed him where Manny Moo's apartment was.

MR. FISCHEL: Thank you very much.

THE COURT: All right. May this witness **[2320]** be excused?

MR. THOMSON: One other question.

REDIRECT-EXAMINATION

BY MR. THOMSON:

Q What did he say what he was doing with the rounds?

A I asked him what he was doing with the rounds. He said him and his friends had been target practicing. And, I asked him more about if he had a weapon on. I didn't know if he had one or not.

MR. FISCHEL: Follow up

RECROSS EXAMINATION

BY MR. FISCHEL:

Q Did he have a weapon on him?

A Not on his person. No, sir. Not that I know of, sir.

MR. FISCHEL: Thank you.

THE COURT: May this witness now be excused?

MR. THOMSON: Yes, sir.

THE COURT: You are excused. You may leave. Thank you.

(WHEREUPON, the witness is excused from further [2321] attendance upon the court.)

THE COURT: Mr. Thomson?

MR. THOMSON: Michael Bridge.

Whereupon,

MICHAEL S. BRIDGE

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q Would you state your full name for the jury, please?

A Michael S. Bridge.

Q And, what is your occupation?

A Maintenance tech at the Regional Jail.

Q CFW Regional Jail?

A Yes, sir.

Q Have you had any contact with the Defendant in that jail?

A Yes, sir. I have.

Q Would you tell the jury what your job is there?

A Just do the maintenance work. **[2322]**

Q You are a maintenance tech?

A Yes, sir.

Q Were you doing maintenance work in the area where the Defendant was housed?

A Yes, sir.

Q Directing your attention to September 13th, did you have a conversation, or an exchange between you and the Defendant?

A Yes, sir.

Q Could you describe that for the Court?

THE COURT: The Year 2000?

MR. THOMSON:

Q I am sorry, Your Honor. The Year 2000?

A Yes, sir.

Q All right. I am sorry. Go ahead.

A We came up there to do some work on some things. And, there was already a little bit of a confrontation going on between Mr. Bell and one of the officers over handcuffs, or something. He was already upset when I came in.

He thought I saw the whole thing. But, I was outside of the day room and I didn't pay no attention,

which I normally don't. If there is a [2323] confrontation, I stay out of the scene, because I am not trained to handle that kind of stuff.

He wrote up a report and he mentioned me as a witness, and when I didn't agree with what he said I saw, he got upset with me and next time I was up there he made some threats towards me.

Q Could you tell us exactly what he said to you?

A He called me a liar on several occasions, one time in the hallway. And, then when we were up in the day area to go up there to work, he got all of the inmates riled up. They were kicking the doors and screaming and cussing. And, he told me I was next and he was going to kill me.

Q Did you report this to Captain Wordebaugh

A Yes, sir.

Q Did you ask not to go into that pod anymore?

A Yes. And, I haven't bene back in since.

Q Did he say anything to you afterwards in the hallway?

A One time in the hallway when he come down, I was walking through and they were taking him back in. And, he turned around and said, "Why don't you come [2324] work in my cell for a while?"

Q Okay. Is the gentleman that made these statements to you present?

A Yes, sir.

Q Would you point him out?

A Yes, sir. Mr. Bell.

THE COURT: He has pointed to the Defendant, Mr. Bell.

MR. THOMSON: That is all of the questions I have of this witness at this time.

MR. FISCHEL: No questions.

THE COURT: May this witness be excused?

MR. THOMSON: Yes, sir.

THE COURT: All right. You may be excused. You may leave or stay.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Officer Robinson.

WHEREUPON,

OFFICER CRAIG ALLEN ROBINSON

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

[2325] DIRECT - EXAMINATION

BY MR. THOMSON:

Q State your name, please, sir.

A Craig Allen Robinson.

Q And, what is your occupation?

A Correction Officer, CFW Regional Jail.

Q Okay, in connection with your duties as a correction officer, directing your attention to August 18th, Year 2000, did the Defendant make a statement to you on that day?

A Yes, sir.

Q Would you tell the jury what that was?

A He said, "You are a big man with this handcuffs on. If you take these off, then you will see what happens."

Q What were you doing in connection with this incident? What were you doing with the Defendant?

A We were letting him out for his hour a day. They get an hour and fifteen minutes a day. They

have cuffs on when we let him out. And, they stick their hands through a food shoot in the door. And, I was taking the cuffs off at that time.

MR. THOMSON: That is all of this **[2326]** officer.

MR. FISCHEL: No questions.

THE COURT: May this witness be excused?

MR. THOMSON: Yes. He can be, Your Honor.

THE COURT: Did I understand that he was back in his cell at this time?

THE WITNESS: He was in the day area.

THE COURT: In the day area.

THE WITNESS: Yes. They have six cells, and then they have the general area that they come out for their shower and t.v. room, phone. We were on the other side of the door.

THE COURT: He made this comment when you were taking the cuffs off?

THE WITNESS: Yes, sir.

MR. FISCHEL: In light of that, Your Honor, may I follow up?

THE COURT: Yes.

CROSS EXAMINATION

BY FISCHEL:

Q So, when this happened he was already in a secured area? **[2327]**

A Yes, sir.

Q He was not in the same immediate proximity of you. He was on the other side, behind some bars, or something of that nature?

A Yes, sir.

Q So, he just had his hands through so you could uncuff them and pull back uncuffed hands?

A Yes, sir. He said, "Come back in without the cuffs and ...

Q It was unlikely that you would do that; wasn't it?

A We had to go back in and put him away after his hour and fifteen minutes were up.

Q Did he stick his hands back out to get rehandcuffed at that time?

A Yes, sir.

Q Was he violent at that time?

A No, sir.

Q Whatever was bothering him, he calmed down?

A For the time. Yes.

MR. FISCHEL: Thank you.

THE COURT: Now you are excused. Thank you.

[2328] (WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Corporal David Sheriff. Could we approach the bench on this witness, Your Honor.

THE COURT: Certainly. Just hold him there for a minute, if you would, please.

BENCH CONFERENCE

MR. THOMSON: He is a Jamaican constable. He does have a certified conviction order from Jamaica concerning a conviction of the Defendant I think in 1985. We provided a copy to Defense Counsel. We are not offering it in the way that the Statute contemplates certified conviction orders being offered in a bifurcated felony proceeding.

We are offering it as evidence of misconduct evidence. So, it would not be offered in the way other convictions are being offered. The Statute only contemplates the admission of certified conviction orders from Unites States and I believe its territories. Clearly Jamaica is not, but it is misconduct evidence. So, I just wanted to make that technical point clear.

[2329] MR. FISCHEL: Objection. I don't think it is proper evidence to come in. It hasn't met the Statutory requirements.

THE COURT: Does he have personal knowledge of this?

MR. THOMSON: He has personal knowledge of the incident and he has personal knowledge of the conviction.

MR. FISCHEL: He can testify to that, but the document . . .

THE COURT: If he was simply here to bring this order in and has no personal knowledge about its circumstances, I would exclude it because of what Mr. Thomson just said. But, if he can testify that he is personally familiar with the circumstances, and personally familiar that he was convicted, I see no reason not to admit the order. So, I will note your exception to that.

MR. FISCHEL: Yes, sir.

THE COURT: But, it is conditioned upon being able to testify in that way.

MR. THOMSON: Yes, sir.

OPEN COURT.

[2330] THE COURT: Bring the witness forward, please.

Whereupon,

CORPORAL DAVID SHERIFF

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q State your full name, please, sir.

A David Sheriff.

Q David Sheriff?

A Yes, sir.

Q And, what is your occupation?

Q I am a police officer

Q Where?

A In Jamaica.

Q In which section of Jamaica are you a police officer?

A I am at traffic headquarters in Kingston.

Q In Kingston. And, do you know Edward Bell?

A Yes, sir.

Q Point him out for the Court, please.

[2331] THE COURT: He has pointed to the Defendant.

BY MR. THOMSON:

Q How do you know Edward Bell?

A I was stationed in Portland where he is from, sir.

Q Now, Jamaica does not have states; correct?

A We have parishes.

Q You have parishes? And, Portland is a perish?

A Yes, sir.

Q All right. When were you stationed in Portland?

A When?

Q Yes, sir.

A From 1983 to 1988.

THE COURT: 1983 TO 1988?

THE WITNESS: Yes, sir.

BY MR. THOMSON:

Q Did there come a time in 1985, when you became involved in an incident that involved Mr. Bell?

A Yes, sir.

Q Did Mr. Bell go by the name of Edward Bell **[2332]** then?

A Yes, sir.

Q Did he also have nicknames that you knew him by?

A Yes, sir.

Q What did you call him?

A Slow.

Q Slow?

A Slow or Boisey.

Q Boisey?

A Yes, sir.

Q Did you take a report involving an incident with Mr. Ell?

A Yes, sir.

Q And, in connection with that report, did you observe the injuries on the victim?

A Yes, sir.

Q Where were they?

A He had one on his left knee, a swelling on his left knee and wound on the left palm.

Q A wound on the left palm?

A Yes, sir.

Q In connection with those wounds, was the **[2333]** Defendant charged?

A Yes, sir.

Q Was he convicted?

A Yes, sir. He was convicted.

Q He was convicted of how many offenses?

A Two offenses.

Q What were they?

A Assault (inaudible) and malicious destruction of property.

THE COURT: You said assault. What else did you say?

THE WITNESS: Malicious destruction of property.

THE COURT: What was the assault? Then you said something else. I didn't understand you.

MR. THOMSON: The abbreviation after assault.

THE WITNESS: Assault OBN.

MR. THOMSON: What does that mean?

THE WITNESS: When you get swelling.

THE COURT: That is part of the charge?

THE WITNESS: Yes, sir.

BY MR. THOMSON: **[2334]**

Q Now, in connection with the court proceedings, the Defendant plead guilty to one charge?

A Yes, sir.

Q And, one charge was tried? Or three. . .

A Three charges were tried.

Q And, two were dismissed?

A Two were dismissed and he was convicted on one.

Q In connection with those charges, you provided copies?

A Yes, sir.

Q And, this copy that I am showing you reflects the court procedure; correct, sir?

A Yes, sir.

MR. THOMSON: Move the admission of the document. The Court should have that. I believe that was placed in the Court file.

THE CLERK: Prior to trial?

MR. THOMSON: Yes, sir. This may be easier to read.

A JUROR: It was in with the other exhibits.

THE COURT: The jury is saying that it **[2335]** may be in the first packet.

THE CLERK: You mean yesterday?

A JUROR: Today.

THE CLERK: You mean Exhibit 300? I see something that says "to the Queen" on it. That has got to be it.

MR. THOMSON: That would be it, Your Honor.

THE COURT: Well, gentlemen, it appears that this went to the jury in the first part of the penalty phase.

MR. THOMSON: Unbeknowance to us, Your Honor.

THE COURT: Deal with that separately.

MR. FISCHEL: I will just ask the witness a couple of questions and then we can deal with it.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. FISCHEL:

What was the sentence of the court for the charge or charges that he was convicted of?

A Malicious destruction of property. It was **[2336]** admonished and discharged and he paid $26.00 for the shirt.

Q He paid restitution to the victim for the shirt?

A For the shirt, $26.00. Yes.

Q And, he was admonished and discharged?

A Admonished and discharged.

Q What does that mean? That is not something that we are familiar with.

A He was convicted but not sentenced.

Q So, the Judge basically said, "Watch out."?

A Yes, sir.

Q What happened in the second charge?

A He was fined $80.00 or ten days.

Q So, if he had no money he would have gone to jail for ten days?

A Right.

Q If he had $80.00 he could pay the fine and not go to jail?

Q Yes.

Q That was it?

A Yes, sir.

MR. FISCHEL: Thank you.

[2337] THE COURT: So, the destruction of property was the tearing of a shirt?

THE WITNESS: Tearing of a shirt.

THE COURT: Anything further of this witness?

MR. THOMSON: Not at this time.

THE COURT: You say "not at this time". You expect him to wait?

MR. THOMSON: No, sir.

THE COURT: You are excused. You may leave. Thank you very much.

(WHEREUPON, the witness was excused from further attendance upon the Court.)

* * *

[2351]

* * *

MR. THOMSON: Commonwealth calls Billy Jo Swartz

THE COURT: All members are back with us.

WHEREUPON,

BILLY JO SWARTZ

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined [2352] and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q State your name, please, ma'am.

A Billy Jo Swartz.

A How old are you?

A Twenty Three.

Q Do you know the Defendant, Edward Bell?

A Yes. I do.

Q Point him out, please.

A Right there.

THE COURT: She has identified the Defendant.

BY MR. THOMSON:

Q Directing your attention to the year 1997, did you know him then?

A Yes. I knew of him.

Q What was your relationship like with him?

A It was good and bad.

Q Okay: You had a relationship with him?

A Yes. I did.

Q Did there come a time when he assaulted you?

A Yes. **[2353]**

Q Would you tell the jury what occurred?

A Sure. We kind of got into an argument, and then a couple of days later he came up to my aunt's house on Highland.

Q On Highland Avenue in Winchester?

A Yes, sir.

Q Okay.

A And, so we started drinking and stuff and I left. And, so in about four or five hours he come down where I was. That was 544 North Kent Street.

Q What happened then?

A I heard him outside. He was really angry and saying things, and kicked the door and stuff. So I went out the back door.

So, in the back of my house where it was. . . My aunt's house you can see from the green house on Kent Street where the alley is. So, I went through

there. And, he was already at my aunt's house, already on Highland Avenue.

You know. . . It was dark. He had on all black that day, anyway. So, when I was walking I just heard him, what he said. "Blood clot, bloomer clot, bitch."

Q Then what happened.

[2354] A Then I went in my aunt's house finally on Highland. So, he come knocking on the door. He told Bonnie, said, "Would you tell Jodie. . ." that is my nickname, Jodie. ". . .to come outside."

And, I am like well, you know. . . He said he didn't want to hurt me or nothing. He just wanted to talk. Wanted to know why I left him there for all those hours and didn't come back. So, I said, "Okay."

Q So, you went outside?

A Yes. I did.

Q Then what happened?

A Then we started arguing and stuff, and he grabbed the back of my head and slammed my head into his car into his car.

And, so he pulled my shorts down, and put his finger in me and stuff.

Q In your vagina?

A Yeah.

Q Okay. What was he saying when he did that?

A He said I was messing around on him. I told him I wasn't. And, he said if he found out he would kill me.

Q Was this out on the street? **[2355]**

A Oh, yeah. I mean, it was loud. My aunt came outside.

Q Was there a weapon involved?

A Yeah. A gun.

Q Would you tell the jury what he did with the gun?

A Yeah. He hold the gun to my head at the same time. And, then like we got into the car, and his girlfriend at the time, Tracy Nicholson. She was pregnant by him. Just had a boy by him. And, she was pregnant again. And, so, it was raining and stuff that night, so we got in the car.

She pulled up. Because where the car was, it was facing this way and she was coming this way. So, we couldn't go no where.

So, she parked the car on the side. So, she got out of the car come over there.

MR. FISCHER: I am going to object in advance to anything that Tracey did. It is not relevant to the . . .

THE WITNESS: Well, I am just explaining what happened that night.

THE COURT: Don't know what she is **[2356]** going to say. I can't rule, Mr. Fischel. Do you all want to proffer what she is going to say, Mr. Thomson?

MR. THOMSON: I think she is describing the whole incident, Your Honor.

THE WITNESS: What happened.

THE COURT: All right. Go ahead. We will see.

THE WITNESS: Okay. And, then she got out of the car. She was hollering and screaming. Come by my side, but the doors and stuff was locked. She come by Mr. Bell's side on the driver's side. He got out and he started arguing and stuff.

THE COURT: Who was arguing?

THE WITNESS: Mr. Bell and Tracey Nicholson. They was arguing. They were boyfriend and girlfriend at the time. So, they was arguing and stuff. Eddie hit her and knocked her down. She was pregnant. They was both fighting.

BY MR. THOMSON:

Q Then what happened next?

A And, then Eddie knocked her down again. He got in the car. And, Tracey jumped on top of the car, on top of the hood. And, she jerked the **[2357]** windshield wiper off. Eddie took off.

MR. FISCHEL: I object to what she did.

THE COURT: Overruled.

BY MR. THOMSON:

Q Go ahead, ma'am.

A Eddie took off and stomped on the brakes and Tracey flew off of the car on the side. She flew off the car on the side, right on the left-hand side. She flew off the car.

Q Where were you when this happened?

A I was inside the car when it happened. I said, "On my, God. You ain't going to stop."

He said, "Hell with that bitch." Exact words he said.

Q Did you have any injuries that are long-lasting as a result of that?

A Yeah. I have got a knot on my head still from that day, and I called. . . When it happened. . .

Q What was that knot from?

A The gun. When we went around the corner. . , It was raining. And, I came up by my aunt's house, and all of the cops was there, because Tracey

Nicholson went in my Aunt Bonnie's house on Highland [2358] of the incident.

So, I come back around. He started running. I run back down to the house on Kent Street. I come back up. My Aunt Bonnie said, "Tracey up here all hysterical." Actually, what really happened?

I was crying and stuff and I called my grandmother and told her everything.

MR. FISCHEL: Now, Your Honor, we are going way beyond anything about Mr. Bell.

BY MR. THOMSON:

Q You called your grandmother, and then what did you do next?

A Then I got a cab home.

Q You were describing the knot on your head, and how you got that.

A Uh, huh.

Q How was that?

A Hit me up beside the head with it. We was arguing and stuff with the gun. We was arguing and stuff in the car, and everything. And, he smacked me up beside the head, and I pointed my finger in his face and said don't you ever hit me again.

Q Where is the knot ma'am? [2359]

A Right. Here. It is still here if you want to feel it. It is on the right side.

MR. THOMSON: Up to the jury, Your Honor.

THE COURT: Won't be necessary. Anything further, Mr. Thomson?

BY MR. THOMSON:

Q Did you ever, during this period of time, see him with any drugs?

A Yes, crack cocaine and marijuana?

Q Where was that that you would observe that, ma'am?

A In his house on Piccadilly Street when he was living with Tracey, and over at my cousin's house Cheryl, with the weed. And, the coke over on Piccadilly Street.

Q What was he doing with it?

A Bagging it up.

Q Bagging it up for sale.

A Yes. I know that for a fact.

MR. THOMSON: All of the questions I have at this time. Thank you. Would you answer Defense Counsel's questions? **[2360]**

MR. FISCHEL: No questions.

THE COURT: May this witness be excused?

MR. THOMSON: Yes, Your Honor.

THE COURT: All right. You are excused. You may step down. Thank you.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Annette Blye. Not sure the Court ever ruled on the admissibility of the prior conviction orders. That is when we got into the wrangle. The package that we had offered. They have been admitted?

THE CLERK: Yes.

THE COURT: It is Exhibit 300. The jury can consider those at this stage, as well.

All right. Ms. Blye, would you come forward.

WHEREUPON,

ANNETTE BLYE

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

[2361] BY MR. THOMSON:

Q State your name, please, ma'am.

A Annette Blye.

Q How old are you?

A Thirty-four.

Q Directing you attention to 1999, did you know Edward Bell during that year?

A Yes.

Q Is he present in court?

A Yes.

Q Would you point him out for the jury?

A Right here.

THE COURT: She has identified the Defendant.

BY MR. THOMSON:

Q Did you ever buy any illegal drugs from him during that year?

A Yes.

MR. THOMSON: That is all of the questions I have.

THE COURT: Cross?

MR. FISCHEL: No cross, Your Honor.

THE COURT: You are excused.

* * *

[2372]

* * *

IRENE LOUISE STONE

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q. State your full name, ma'am.

A. Irene Louise Stone.

Q. How old are you?

A. Forty-three.

Q. Do you live in Winchester?

A. Yes. I do.

Q. Do you know the Defendant, Edward N. Bell?

A. Yes.

Q. Would you point him out for the jury, ma'am?

THE COURT: She is pointing to the Defendant.

[2373] BY MR. THOMSON:

Q. Directing your attention to 1999, did you know him during that year?

A. Yes. I did.

Q. Did you buy cocaine from him?

A. Yes. I did.

Q. Would you tell us if you went in the company of others when you did that?

A. Annette Blye and I.

Q. Did you ever buy from him directly?

A. Yes. I have. A couple of times.

MR. THOMSON: That is all of the questions I have. Thank you.

MR. FISCHEL: No questions.

THE COURT: May this witness now be excused?

MR. FISCHEL: Yes.

MR. THOMSON: Yes, sir.

THE COURT: You are excused. You may leave.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Patrick Morrison. **[2374]**

WHEREUPON,

PATRICK MORRISON

was called as a witness on behalf of the Commonwealth and after having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. THOMSON:

Q. Would you state your name, please, sir?

A. Patrick S. Morrison.

Q. Speak into the microphone, please.

A. Patrick S. Morrison.

Q. Mr. Morrison, directing your attention to July 1st, 1997, did you know at that time, Dawn Jones?

A. Yeah.

Q. How did you know her?

A. Just a friend.

Q. Just a friend. Were you present a Dodson's Trailer Park on an occasion when Mr. Bell was there?

A. Yeah.

Q. Would you tell the jury what happened?

A. Well, I was just in the house. Come inside. He pulled a gun. That is it. **[2375]**

Q. He had a gun?

A. Yes.

THE COURT: I can not understand you. Would you speak slowly, please.

THE WITNESS: I was sitting in a chair in the trailer and he come with a gun. That is it.

THE COURT: Who came with a gun?

THE WITNESS: Eddie.

THE COURT: He has nodded towards the Defendant, and called him "Eddie"

MR. THOMSON: All of the questions

MR. FISCHEL: No questions.

THE COURT: What did he do with this gun?

THE WITNESS: Huh?

THE COURT: What, if anything, did he do with the gun?

THE WITNESS: Didn't do nothing.

THE COURT: Didn't do anything with the gun?

THE WITNESS: No

THE COURT: Just had the gun with him?

THE WITNESS: Yeah. **[2376]**

THE COURT: Anything further?

MR. FISCHEL: No questions.

MR. THOMSON: Move he be excused, Your Honor.

THE COURT: Excused from further attendance.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Call Dawn Jones.

WHEREUPON,

DAWN JONES

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q. Would you state your full name, please, ma'am?

A. Dawn Elizabeth Jones.

Q. Where do you live?

A. Martinsburg, West Virginia.

Q. Do you know Edward Bell?

A. Yes. **[2377]**

Q. Is he present in court?

A. Yes.

Q. Would you point to him, ma'am?

THE COURT: All right. Pointed to Mr. Bell, the Defendant

BY MR. THOMSON:

Q. Directing your attention to July 1st, 1997, where were you living then?

A. Dodson's Trailer Park.

Q. Dodson's Trailer Park?

A. Yes.

Q. Where was that located?

A. In Martinsburg onRoute 5.

Q. Did Mr. Bell come to your residence that day?

A. Yes.

Q. Did he have a gun?

A. Yes.

THE COURT: What was your answer to that question?

THE WITNESS: yES.

BY MR. THOMSON:

Q. What happened with the gun in the trailer? **[2378]**

A. Just saw him pull it out. That is all.

Q. Who else was present?

A. Patrick Morrison.

MR. THOMSON: That is all questions I have. Thank you.

MR. FISCHEL: No questions.

THE COURT: What was going on when he pulled it out?

THE WITNESS: An argument.

THE COURT: An argument between whom?

THE WITNESS: Him and Patrick.

THE COURT: Did he do anything wit it after he pulled it out?

THE WITNESS: No, sir.

THE COURT: All right. Any further questions?

MR. FISCHEL: No, sir

THE COURT: May this witness be excused?

MR. THOMSON: Yes, sir.

THE COURT: All right. You are excused.

(WHEREUPON, the witness is excused from further attendance upon the Court.) **[2379]**

MR. THOMSON: Deputy Sardellous.

WHEREUPON,

DEPUTY DOUG SARDELOUS

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q. State your full name, please, sir.

A. Deputy Doug Sardelous.

Q. Deputy Sardelous, directing your attention to August 14th, 1997, did you see the Defendant that day?

A. August 14th or 15th?

Q. 15th.

A. Yes.

Q. Where was that?

A. It was on National Avenue, right at Highland Avenue.

Q. What was were you doing at that time? Were you a Winchester Police Officer?

A. Yes, I was in Winchester Police Officer. I was assisting Officer Smith with a traffic stop. **[2380]**

Q. Was Mr. Bell driving a car?

A. Yes, sir.

Q. Was the trunk of his car searched?

A. Yes, sir. It was.

Q. Did you find a weapon in there?

A. Yes, sir. I did.

Q. Where was it?

A. It was inside of a black sock stuck down between a large speaker and the fenderwell.

Q. What was the caliber of the handgun?

A. .38.

Q. Was there anything unusual about the weapon?

A. The serial number was filed off, or scratched off.

MR. THOMSON: That is all of the questions I have. Thank you.

CROSS-EXAMINATION

BY MR. FISCHEL:

Q. Any charges placed?

A. Yes, sir.

Q. What was the disposition?

A. I believe they were dismissed.

MR. FISCHEL: Thank you. [2381]

REDIRECT EXAMINATION

BY MR. THOMSON:

Q. Was the weapon forfeited?

A. Yes, sir. I believe so.

MR. THOMSON: That is all.

THE COURT: Is this witness excused?

MR. THOMSON: Yes, sir.

THE COURT: All right. You are excused.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Commonwealth will call Richard Timbrook.

WHEREUPON,

RICHARD TIMBROOK

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q. Would you state your name, please, sir?

A. State your name for the Court please, sir.

A. Richard Timbrook.

Q. And, you are the father of Ricky Lee **[2382]** Timbrook?

A. Yes, sir. I am.

Q. Could you briefly describe for the jury your relationship with Ricky Timbrook?

A. I know that sitting up here you probably think what I am saying isn't true. Rick was more of a best friend than he was a son. We did things that father and sons all do together.

And, I will give you an example. My son, before he got married, we had a bachelor party. My son would not attend the bachelor party unless I went. So, to tell you our relation was unique, it was.

When my boy was in college I would go up and spend weekends with him. We played golf together. From the time my boy started playing ball he was in seventh grade until he died, a week never went by that I didn't see him. So, yes. We had a relationship that I can honestly sit here and tell you that if there ever was someone proud, you know, it was me.

No matter what Rick done, I was part of it. And, that I will never have again. **[2383]**

Q. Sir, your son was expecting a child?

A. Yes, sir. For my Father's Day gift Rick brought me up the ultrasound of the baby. We... There is a lot of us in this world that are maybe heroes. You are the hero to the son. I can sit here

and tell you that I was a hero. My son was a hero to me.

Rick could do things that, God in Heaven, I can only dream of. Rick would practice basketball. He would practice basketball for eight or ten hours a day just to be a good basketball player. And, he was.

Rick... You know, a lot of things might have come easy in the latter part of his life. In the beginning, the funny things, you know. Rick was only five foot three when he was a sophomore in high school. He used to hang on the rafters in our garage to make himself grow. He could probably jump 38 or 40 inches, vertical leep.

But, you know, folks, Rick went out with his own money. He bought a thing called a "Leeper". He would practice hours at a time to learn how to leep. I mean, there was nothing that Rick... I mean, he put his heart into everything. **[2384]**

Q. Your son was a police officer?

A. Yes, sir.

Q. Did you see him?

A. All of the time. I rode with Rick. I was lucky. I got to ride with him. I get off at 2:30 in Manassas. I would drive to Winchester. I knew if I cut the corner twice, Rick was there. I probably was a pest, because I would pull into the police station and wait on the other side of the wall just to say "Hi." I will be honest with you. I miss him so much.

Q. Can you, then, give the jury an idea of how your life has changed since Rick's death?

A. I don't have one. I have a daughter who I am proud of. I have three beautiful grandchildren. But, when I brought... When Kitty and I brought Rick home from the hospital... some of us in this world are

not really smart. Kitty and I didn't know about welfare or anything.

When Kitty was pregnant with Rick, she couldn't keep anything down. And, we had to take her to the hospital twice a week to feed her through her veins so that... And, we really felt that Rick...would have to be something wrong, because she **[2385]** was really sick with Rick.

On October 5th when he was born, God in Heaven, he was perfect. I brought him home. I took care of Rick. I give him his first bath. I changed his first diaper. We didn't have any money. We lived for the first summer that we were married off of cucumber sandwiches. That is how poor we were. It was a good year.

Q. Sir, since his death, what kinds of things occupy our time?

A. Nothing, really. I mean, I play golf when I can. I don't sleep. I haven't slept, you know, four hours a night in a year and a half. When I go to work in the morning, I see his face, when I am going down the highway. I can tell you ever dimple on his chin, or marking on him.

I used to love to rub his crew cut. Rick would get a haircut every five days whether he needed it or not. I would rub his head, and he would say, "Dad, you are going to mess it up." Gee, what was there to mess up? You know... I am sorry. I am sorry, sir.

Q. Let me ask you one last question in closing. **[2386]** Where did you spend Rick's last birthday? Would you tell the jury?

A. Where did we spend his last weekend?

Q. His birthday after he passed away?

A. At the cemetery. His gift was that we .... So.

MR. ABRAMS: I have no further questions. Would you answer Mr. Fischel's or Mr. Williams' questions?

MR. FISCHEL: We have no questions for this gentleman.

THE COURT: All right. You are now excused. You may stay in the courtroom.

(WHEREUPON, the witness is excused from further attendance upon the court.)

MR. THOMSON: Kitty Timbrook.

THE COURT: Do you want a recess?

A LADY JUROR: Yes. Could we have five minutes?

(WHEREUPON, a recess was had to accommodate a juror)

THE COURT: Bring the jury back in. Is the witness is still in the courtroom? Bring her in. Kitty Timbrook. All right. All members of the jury [2387] are back with us. Ms. Timbrook, would you come forward and be sworn, please

WHEREUPON,

KITTY TIMBROOK

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. THOMSON:

Q. Would you state your full name for the, Court, ma'am?

A. Kitty Delores Timbrook.

Q. Your son was Sergeant Rick Timbrook?

A. That is correct.

Q. When was he born?

A. Oct. 5th, 1967

Q. Do you remember his first day at school?

A. Absolutely. I think all mothers fear when they finally leave home and take their first day at school.

Q. During your relationship and your life together with your son, was it family oriented time you spent with him? **[2388]**

A. Absolutely. We always did everything together. Picnics. Everything together, even when they were in school. Sports. We never just sent out children off to school and to activities without being involved. We were, as we always told him: We are you best cheerleading but we are also your worst critic, too. We were always there. Always very supportive of him. Always praising him because we were proud of him.

Q. Do you remember his first girlfriend?

A. Yes.

Q. Any special, unusual memories about that?

A. Yes. My son would eat and sleep basketball. That was his favorite activity. In seventh grade his first girlfriend, finally told him that she didn't want to go with him any more because he didn't want to hold her hand. He would rather watch basketball or play basketball. We would always tease him about that. They remained friends throughout high school and college.

Q. Do you remember the police academy

A. Yes. Yes. I do. Very proud of him. Rick was always brought up to, Kimberly, too, to respect people no matter what status they had, whether they

[2389] were a judge or whether they were someone on the street. They were taught to respect them.

Q. Did you participate in his wedding?

A. Yes. I did. It was a very happy time. He and Kelly. Everybody was involved. Rick always made things a happy time.

And, when he went to the police academy... It is something that I didn't want him to do. When he was in school and in college, he said, "Mom, I want to do something that when I get up in the mornings, I want to know that this is something that I want to do. And, I want to be a police officer I want to be able to help people."

Then he met Kelly. It was a very happy time. Kelly was like a part of our family from the very beginning. They decided to get married. There was so much happiness and so much laughter, so much love between two individuals that most people can only dream about. And, I can remember my son's words when they were leaving for their honeymoon. "Mom, this is the happiest day of my life."

And Rick and I had a lot of good talks, a very close relationship for a mom and a son. [2390] And, we would talk about a lot of his life, and lot of things that he wanted to do. And, just a very open, good relationship.

Q. Did those talks continue up to his death, ma'am?

A. Absolutely. Never failed that when the phone would ring, I could almost sense that it was my son calling and he just had a way of... It wasn't always, "Hey, Mom, what are you doing?" It was sometimes, "Hey, Kitty, what you doing?"

And, I would say, "Oh, nothing. What are you doing?"

He would always say, "I would like to borrow million dollars?"

I said, "Well, I am afraid you have the wrong parents for that."

Q. Wrong profession, too?

A. Wrong profession.

Q. In connection with how this has affected you, I know it is hard for you to put into words, but can you tell the jury some of the ways it has affected you and your family?

A. Very angry. Confusion. I just... We **[2391]** received that phone call on October 30th, early morning hours, and the words a mother never wants to hear is to hear that your son is dead. And, disbelief, and shock. This can't be. Not my son. Not my child. It has been a nightmare.

Our children were taught and raised to respect people. To love your fellow man, because that is what God wants you to do. There was happiness about our children. Rick's smile was contagious. And no matter how bad a situation was, he always made it sound like it really wasn't a problem at all. And, he would end up laughing.

MR. THOMSON: That is all of the questions I have, Your Honor.

MR. FISCHEL: No questions, Your Honor.

THE COURT: You are now, excused. You may stay in the courtroom.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. THOMSON: Commonwealth calls Kim Hudson.

WHEREUPON,

KIM HUDSON

[2392] was called as a witness on behalf of the Commonwealth and after having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. THOMSON:

Q. State your name, ma'am

A. Kimberly Hudson.

Q. You are Sergeant Rick Timbrook's sister?

A. Yes.

Q. Was he your older brother?

A. Yes.

Q. How much older was he?

A. One year and four days.

Q. Can you describe for the Court and the jury, ma'am, how his death has affected you?

A. I don't have my brother anymore. Ricky was... Ricky was like my hero. I mean, he always protected me and looked out for me.

Q. Did he do special things for you?

A. When he was away at college every week he would come home. It was always me he would call to go to the movies. It was always, "Hey, sis."

Q. Did you have children ma'am? **[2393]**

A. Yes. Two.

Q. Did Rick interact with those children?

A. He was teaching my daughter to count in Spanish. He would call her all of the time just for her to count to him.

And, my son, him and Ricky would always have this game about who Aunt Kelly liked better. Bradley would always said she liked him better because he was cuter.

MR. THOMSON: That is all of the questions I have.

MR. FISCHEL: No questions.

THE COURT: You are excused. You may remain in the courtroom.

(WHEREUPON, the witness was excused from the case.)

MR. THOMSON: The Commonwealth calls Kelly Timbrook.

THE COURT: Kelly Timbrook.

WHEREUPON,

KELLY TIMBROOK

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows: **[2394]**

DIRECT EXAMINATION

BY MR. THOMSON:

Q. Would you state your name for the jury and the Court, ma'am?

A. Kelly Lee Wiscarver Timbrook.

Q. You were married to Sergeant Rick Timbrook?

A. Yes, sir.

Q. Describe to the jury how his death has affected you?

A. I brought my "Impact Statement". May I read it?

Q. It is okay with the Commonwealth if she does.

A. It is just hard to...

THE COURT: I understand. You may read it. Would you turn toward the microphone as you read it? The one on this end amplifies you.

A. Sorry if I talk fast. "The impact this has had on both of my families is hard to sum up. I think the word that best describes us is the loss of caring. Our family seems to be lost in all of the hurt and anger. My father-in-law summed up our thoughts by stating that even though we still have people around **[2395]** us that we that give us joy, it doesn't override the wish to be dead. The loss is too great to overcome. I only hope that one day we will make it through, although I am not sure all will make it.

In defining the psychological effects this has had on me, I think it is sad that at 31 years old I am a widow and this is how I view our lives. I I remember how excited Rick was when he found out that we were pregnant. We were so worried something was going to happen to our previous gift. Little did we know that our lives would be ruined forever.

The week of Ricky's funeral felt like a blur. It was too painful to tolerate. I think I was numb. After I made it through that awful week, I had to try to pick up the pieces of my terrible reality. The reality that I had a new home almost complete, a baby to arrive in eight weeks, and a widow filled with loneliness no words could describe. You will never know that kind of pain until half of you is gone. Widow---I think this is one of the most unbearable words a person could imagine. I remember when I had to fill out all of the necessary paperwork shortly after Rick's death. I didn't know what box to **[2396]** complete when they asked "married, single or other". I am not sure what was

proper, but I know I will always be married in my heart. No matter what has been taken, no one will ever take that away.

When I finally came to grips with the fact that I wasn't in a dream, the baby soon followed. Rick and I had gone to child birthing classes for weeks to prepare for the delivery. We had so much fun our teacher said she wanted to be there for the birth. Suddenly, I didn't have anyone anyone to help me through the delivery, much less rearing our child. Our families were as strong and supportive as anyone could ask, but it doesn't replace Rick.

As Ricky arrived into the world, the entire delivery room staff began to cry. You see this treasured moment was stolen. Tears of sorrow and loss for what might have been. Our son was born without a father.

The weeks prior to his birth I wondered if I should continue to live. I remember pleading with my father not to let them take Rick away the day of the funeral. As I got into my car each day I hoped that the car would cause my car to wreck and end the **[2397]** suffering. I couldn't decide if it was fair to bring my son into such a cruel world unsure of justice. How can I tell him that somebody can take a life without a guaranteed consequence.

I still try to attend church although my faith seems to be somewhat lost. It is hard to believe that someone was watching over us. Where were they when Rick needed help. I am scared I will pass this belief to my son.

People try to remind me of how fortunate I am to have my son. I love my son with all I have, but one is not a replacement for the other. Where is the

person who hugs you when you are said, and who believes you can do anything and you believe so, too. Sometimes I try to dream that Rick is still alive and wake up from this is a nightmare. I can only wait and know that some day we will be together again watching over our son.

As for our son, the effects for the future are unknown. I remember Rick saying that many of the troubled children were from families that didn't have the involvement from both parents. We never wanted this for our son. I think I first **[2398]** realized the huge impact of this tragedy last year on Father's Day. Since the children are so little, teachers often make presents for the parents on different holidays. My son had nothing on this day. I wonder how long it will be before Ricky will ask me why he can't see my daddy. What will I say? How will I begin to explain this injustice so that he will not feel this hate that I do? I can only tell him what his dad would have done and how much he loved him as he read to him during our pregnancy "Oh, Baby, the Places You Will Go", by Dr. Suess.

My son only knows his dad a glass picture frame and a black piece of marble in a graveyard. Not much to hug when you take your first steps and when you fall down. I remember Ricky's first words were "Dada". Those should have been moments to cherish, instead I cried for hours.

In closing, I don't know what the future holds. I do know that I don't like the person that I have became nor the life I live. It will never be as we dreamed. It didn't seem like too much to ask. All we wanted to do was to be able to do things that other families did. I am sorry. Ricky will never **[2399]** know the joy of waking up to his daddy every day. I

hope that some day my son will understand and accept those things that we can not change and learn from those experiences."

MR. THOMSON: That is all of the questions I have.

MR. FISCHEL: No questions.

THE COURT: You may step down.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

BENCH CONFERENCE

MR. THOMSON: Just need clarification oN the ruling that all of the prior evidence that was admitted into the case is received into this phase of the trial, Your Honor. We had the discussion that the other evidence can be considered. I think there is no objection.

THE COURT: I don't think there is any question at all that this jury can consider all of the evidence that they have heard in determining punishment in this case as it relates to future ...

MR. THOMSON: yes, sir. We have revised the instruction. We should be able to run it off here **[2400]** in the next couple of minutes.

THE COURT: You don't disagree with that interpretation; do you?

MR. FISCHEL: Just the opposite. We agree with it. We agree subject to the limitation that the argument has to be correlating the facts to future dangerousness.

THE COURT: Now, what evidence do you have?

MR. FISCHEL: Two witnesses. Very short.

THE COURT; All right. Thank you.

OPEN COURT

THE COURT: Mr. Thomson?

MR. THOMSON: That is all we have.

THE COURT: Commonwealth rests. Mr. Fischel?

MR. WILLIAMS: Your Honor, we call Marjorie Bell.

WHEREUPON,

MARJORIE BELL

was called as a witness on behalf of the Defense, and after having been first duly sworn was examined and **[2401]** testified as follows:

DIRECT-EXAMINATION

BY MR. WILLIAMS:

Q. State your name, please.

A. Marjorie Anna Bell.

Q. How old are you?

A. Thirty one.

Q. You are Eddie Bell's sister?

A. Yes. I am.

Q. How many brothers and sisters do you have?

A. Originally ten girls and four boys. Two of my sisters passed away.

Q. What Country are you from?

A. Jamaica.

Q. When did you come to the United States?

A. 1990, January of 1990.

Q. Are you employed now?

A. Yes. I am.

Q. Where do you work?

A. American Woodmark.

Q. How long have you worked there?

A. Going on six years in May.

Q. Are you going to school now? **[2402]**

A. Yes. I am.

Q. Where are you going?

A. Lord Fairfax Community College.

Q. What are you studying?

A. Networking.

Q. Have you ever been in trouble with the law before?

A. No, not really. I got pulled over for a speeding ticket after they arrested my brother. I was traveling in the middle of two other vehicles, one in front and one in back. I was pulled up in the middle of that. He said I was speeding. I told him I wasn't. I ended up getting arrested. My ligaments are bruised from that night. They called up backup. When I went to court the officer testified that he had to take extra precaution because he know that I am related to Eddie.

Q. Other than that, have you ever had any trouble with the law?

A. No.

Q. How about your brothers and sisters?

A. None of us.

Q. Do you have any children? **[2403]**

A. Yes. I have four children. Two boys and two girls.

Q. And, what has the impact of this whole tragedy had on your family?

A. A lot. Not just with the police officers. My children been called names at school. Being harassed. My daughter being beat up down the street. Saying that she is Eddie's niece. So, I try to

keep them off the street and stay inside. Hard to do that because they are children.

MR. WILLIAMS: Thank you. Answer Mr. Thomson's questions.

MR. THOMSON: No questions, Your Honor.

THE COURT: May this witness now be excused?

MR. WILLIAMS: She may.

THE COURT: All right. You are excused. You may remain in the courtroom, or leave. It is your option.

(WHEREUPON, the witness is excused from the courtroom.).

MR. THOMSON: Call Edward Bell, Senior.

MR. WILLIAMS: Call Mr. Bell, Senior **[2404]**

WHEREUPON,

OSWALD WALLACE BELL, SENIOR

was called as a witness on behalf of the Defense, and after having been first duly

DIRECT-EXAMINATION

BY MR. WILLIAMS:

Q. Would you state your name, please, sir?

A. Oswald Wallace Bell.

Q. And, are you Eddie Bell's father?

A. Yeah.

Q. How old are you?

A. Sixty four, June coming. Sixth of June.

Q. When did you come to this Country from Jamaica?

A. Started coming here in '66.

Q. 1966?

A. Yeah.

Q. What kind of work did you do in Jamaica?

A. Well, I worked on the farm. When I was in Jamaica, I worked on construction. When I come up here work on the farm.

Q. When did you come to permanently reside in this Country? **[2405]**

A. 1999.

Q. 19...

A. 1999.

Q. Do you own a home here in Winchester?

A. Yeah.

Q. Where do you work now?

A. I worked at Rubber Plant and I work at (inaudible) across the mountain. Rubber in Berryville.

Q. Mr. Bell, over this period of time I tried to get a hold of you on many occasions, and they always say you are working. Do you work?

A. Yeah.

Q. Do you work more than 40 hours a week?

A. Sometimes. Winter time is here. I go straight through because when winter time is... I work outside.

Q. Well, Mr. Bell, you ever been trouble with the law?

A. No. Only up here. They pulled me over for speeding. That is it.

Q. Now, would you tell the jury about how you feel about this whole tragedy? **[2406]**

MR. THOMSON: Objection.

A. Yeah. To my feelings, if he is guilty the act...

THE COURT: Just a minute. Stop. Mr. Thomson made an objection. I am sorry.

MR. THOMSON: Just think the question is so vague, not sure what he is going to address in terms of what he plans on saying in terms of ... you know, the response to the question is the question is so vague. I don't mean to be disrespectful.

THE COURT: Can you come to the bench and proffer what he is going to say, Mr. Williams?

MR. WILLIAMS: Not sure what he will say. I just want him to tell the jury what impact this has had on him and on his family.

THE COURT: Just ask him that question.

BY MR. WILLIAMS:

Q. Mr. Bell, would you tell the jury about the impact that this whole thing has had you and your family?

A. Yeah. If he is guilty of the act and punish him, I would feel it. But, not if he isn't guilty of the act and they punish him. **[2407]**

THE COURT: Would you repeat the last of that, please?

THE WITNESS: If he guilty of the act and they punish him, I would feel it, but not if he didn't do it and they punish him.

MR. WILLIAMS: Thank you.

MR. THOMSON: No questions.

THE WITNESS: Can I say anything more?

THE COURT: Has to be a question. I can't just let you make a statement. Okay. Mr. Williams, I don't know if you have another question or not.

MR. WILLIAMS: Would you explain what you meant.

THE WITNESS: Able to lose (inaudible) I don't think they have the right person. To my knowledge, they don't have the right person. And, to my knowledge....

MR. THOMSON: Object to that line of question and answer.

THE COURT: Have to sustain that.

MR. WILLIAMS: Yes, sir. Thank you, Mr. Bell, you may step down.

* * *

[2413] CLOSING ARGUMENTS

MR. THOMSON: Good afternoon ladies and gentlemen, this is the portion of the trial where you have a very difficult decision to make concerning the punishment of the Defendant where you will decide between life and death.

The Court has instructed you on the law, and if I might take the liberty to go into the burden that we have to prove.

Considering the history and background, that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing serious threat to society. And, having considered evidence in mitigation... evidence in mitigation. I ask you here this afternoon to focus on evidence, and evidence alone.

In this phase of the trial the Commonwealth has put on evidence for you to consider. That, taken with the evidence admitted in this court of law throughout the trial is what you are to consider.

In this portion of the trial the State, in considering the run-ins the Defendant has had with **[2414]** the law, has called a constable from Jamaica as a witness. In 1985, Edward Bell was involved with the law in Jamaica, not on a drunk driving charge. Not on a petit theft charge. Not on running a stop sign charge. But, as you see from the evidence before you that you will have in the jury room, convictions involving assault and destruction to property. And, so we start this terrible saga in 1985 before the trip to the Americas.

The Commonwealth has given you a list of convictions, which you will have in the jury room, indicating various run-ins with the law in this area in West Virginia. One of those convictions was a 1997 conviction for carrying a weapon. And, the complaining officer in that case was Sergeant Rick Timbrook.

After the Defendant was convicted in the Circuit Court in that charge, proceedings were started against him for deportation to go back to Jamaica. And, not withstanding the grave circumstances that he had before him and the choices that he had to make about those circumstances, we produced West Virginia State Troopers today. One of **[2415]** whom testified about the run-in that he had with Edward Bell in 1999, before Edward Bell shot and killed Rick Timbrook.

In that encounter with the Defendant, he proved beyond any doubt, whatsoever, that the death penalty in this case is appropriate.

The charges that you have before you, and as he described the situation, ladies and gentlemen, this

man will always be a continuing threat to any law enforcement officer, let alone the general public.

On a routine traffic stop for speeding, it developed into confiscation for knives, and then the chase that lasted well over an hour involving helicopter searches for the Defendant. Does that sound familiar?

This is not a case, ladies and gentlemen, of a Defendant who will not pose a threat no matter where he is. In the background of this case, as he approaches deportation from carrying a concealed weapon conviction, going through Federal Immigration Court proceedings, he is apprehended across the State Line up here, and they have to bring **[2416]** in helicopters to find him on a routine traffic stop.

It is difficult for you to make the decision between life and death. Nobody in this courtroom would think otherwise of your duty, but it is the duty of this jury to consider the evidence of mitigation, and the evidence, whether he constitutes a continuing serious threat.

And, so, we examine Mr. Bell's conduct while he is incarcerated. And the bulk of the testimony that you heard today in court came from correctional officers and folks working in the CFW Jail about Mr. Bell's conduct. Threats to kill, threats to hurt people who are in there performing routine maintenance functions.

This is not an individual, ladies and gentlemen, who has produced one shred of evidence of mitigation. And, you think to yourself, why would you being incarcerated looming in the horizon is this trial today? It is the same story, ladies and

gentlemen, looming in the horizon in the past was the deportation. Looming in the past was the conviction brought on by Sergeant Timbrook, which led to the deportation hearings. [2417]

And not withstanding that, consider all of the other evidence that came in. The .9mm to the head where the lady testified that she still had the bump. The extreme violence perpetrated by him at that domestic altercation. And, you think to yourself, what horrible facts did she testify about that in the middle of a public street in this City that he would disrobe this woman and check her vagina to see if she had been with somebody else. You think to yourself, get away. Run. What does Mr. Bell have on his person that controls in this way? It is his gun.

And, so as they drive away from the scene and his other girlfriend rolls off the hood of his car, he uses the .9 mm to control the lady who testified today. She wanted to show you how he pistol-whipped her on the head.

The murder for which Edward Bell has been convicted by you involved a law enforcement officer. I anticipate that Defense Counsel will argue, that ladies and gentlemen, he is going to be incarcerated for life if you go with the other verdict.

Ladies, and gentlemen, he killed an [2418] innocent man in cold blood whose wife was pregnant with a child. It wasn't just a man. It was a man wearing a uniform. And, he goes to the Winchester Frederick County Jail, and his actions towards uniformed official personnel in that jail are violent.

Mr. Bell, with this deportation matter looming that was the result of the excellent police work of this police officer continued his unlawful rampage,

not only with the West Virginia State Troopers on the road to Charles Town. He is milling around up in Martinsburg with bullets in his pocket that match a .38.

With all of these troubles looming on the horizon and with his father and mother here, he continues to carry weapons pending hearings and sell drugs. There is no mitigation evidence in this case, ladies and gentlemen. There is no mitigation evidence in this case. There has been no evidence presented by the Defense, or through any other witness in this case in mitigation.

And, so I ask you to do your duty and sentence the Defendant to death. Thank you.

MR. WILLIAMS: Your Honor, Mr. Thomson. **[2419]** Ladies and gentlemen of the jury. I would like to start by saying that even though we disagree with your decision, we certainly have a great deal of respect for it.

And, also like to thank you all. We asked you people to come in here. Nobody volunteered to come in here and take your time and to listen to some very agonizing testimony.

You know, as a lawyer, all of us here, the Judge included, take these things for granted. We have asked you to come into our world and listen to testimony about violence, about crime scenes, autopsies. Things that we see on a day to day basis. I just can't imagine how it is for you all to have to come here and listen to those things. Again, we do thank you.

Now, when I got involved in this case. I was appointed by Judge Hupp in May. And, I had tried three murder cases before this. This is capital case.

I said, "Well, okay. I have done a murder case. I have tried many types of cases. But, I have done murder cases. A capital case is nothing but a murder case." And, I don't mean to say "nothing but a **[2420]** murder case" lightly. But, it is something that I had done before.

But a capital case is just a murder case with more complicated legal issues. That is how I looked at it. And, it is. It is very complicated. And, the closer we got to this trial date, just right up before, the magnitude of what we have tried to do, and what you are going to be asked to do in a few minutes, hit me. And, I don't envy you your job. This has not been an easy job for any of us here who have been involved in this case. And, I want to say that I appreciate the professionalism of Mr. Thomson's office, all of the assistance that we have gotten. And, the professionalism of the police officers involved. We have been treated with nothing but respect for anything that we have asked for or needed. They have been more than glad to help us.

But, getting back to this: We are going to ask you do something that hopefully you will never, ever have to do again in your life. And, that is to decide whether Edward Nathanial Bell lives or dies. It is an awesome responsibility, folks, and I am not envying your task. I am not going to talk too **[2421]** long. You have heard lawyers for eight, nine days. I am going to be brief, so don't worry.

I want you to consider four things when you go back there to make your decision. By now, you have gotten used to jury instructions and the formality of the language. You have a choice. Put Mr. bell to death or you can sentence him to life in prison.

Now, the first issue is future dangerousness in society. Now, what does that mean? Edward Bell is never going to be coming out of jail. So, what we are really talking about, his society is going to be a super maximum prison.

The testimony that was offered was very graphic about a violent man. We didn't rebut it. Not try to defend it, refute it. We didn't.

But, the testimony testimony about his behavior while he was in jail is not quite as bad as it appears. The people that testified were several, I believe an employ, I believe, a guard from there, and talked about threats. Mr. Bell has been incarcerated for fifteen months. Nobody has been assaulted there. Nobody has been harmed. Threats. **[2422]** That is all. Just threats.

So, being placed in a super maximum prison, is he going to be a threat to anybody else every again? I don't think so. Those people are equipped in those prisons to deal with violent people. That is who is there. They know how to handle them, and that is why they are there.

So, say that must be put to death is a worse punishment than life in prison. Let's talk about life in prison. You know. I guess... I am from Fauquier County. We have a Judge, Judge Robinson who gives his standard speech. I have heard it a thousand times when young men come up before him for sentencing. And, he talks about you have got fifty more years on this Earth. And, most of these young men are in their late teens or early twenties. And, if you become a good citizen, you live fifty more years and stop this behavior and be the good person that you can be. Stop coming in places like this. I

have heard that speech more times than I want to hear ever again. He has does it for a purpose. He is trying to get these young men to realize that there are other ways. **[2423]**

But, let's think about the rest of Edward Bell's life. He is 36 years old. Thirty-six. I guess I hadn't until the last couple of years think about life in prison means. I had two clients, two young men, who got life in prison. Both of them 25 years old, get life in prison. It made me think about it. Think about what a prison is, and what a jail is.

I mean, I go into jails routinely all of the time. I don't like it. I go in there. I go in to meet with my client, I am in a hurry to get out of there. I get my business done. I talk to them, but there is no idle chit chat there. I do what I need to do. It is just a feeling of being locked up in this place. I know I am getting out. I know I won't be there that long. I may be an hour, hour and half. Depends on how many people I am seeing. When that door shuts and that steel door shuts behind me, and I am done, and I am there knocking on that door and the guard is not there right away...I am antsy. I want out of here. The first thing I do when I get back to my home, or my office is I wash my hands. It is just a feeling.

I started thinking about these two **[2424]** young guys, twenty-five years old, life in prison. They are going to be in a steel room, basically, about the size of two jury chairs. Maybe a little bit bigger. That is their world. A bunk, a sink, a mattress, a pillow, a toilet, a blanket. Twenty-three hours a day. That is where they stay. Think about. That is the rest of your life. Twenty-three hours a day they get out for one hour a day. That is it. Nowhere else. Nothing to do.

One thing they do learn how to do is write. That is about all they have to do. The penmanship is beautiful. Looks like calligraphy when it comes out of there. I correspond with some of them. That is all they do. There is nothing else. Twenty-three hours a day, and then they get a little time a week. I believe they get three showers a week, and that is the rest of their life. Folks, that is punishment. They are not getting off light. Spending 23 hours a day in an eight by eight steel room.

The third thing I would like you to consider... I am not going over all of this evidence again. You have heard it and heard it again. Been shaped this way. And, been shaped that way. But, if **[2425]** anybody... You folks took notes. I watched you. You were attentive. You went back in there. You talked about this case and came to a decision. So, it wasn't like you came in there, let's find him guilty and get back out. I respect what you did. Again, I don't agree, but I respect it.

But, looking at that evidence again, if anyone has any residual or lingering doubt about what they heard or about what happened that night, this is the time to express it and give this man life in prison.

Certainly, the testimony we heard from the Timbrook Family was terribly emotional. It affected me. I couldn't even look at them. They are good people. And, amazingly, they have been very nice to Mr. Fischel and I. I am not sure I would have treated me that way if I had been in their shoes.

But, Ricky Timbrook is dead. He is dead. And, putting Eddie Bell to death os not going to bring him back ever. It is not. May feel it. They may want that. But, that is not going to bring him back.

I brought up Mr. Bell and Marjorie Bell **[2426]** to show you there are other people. Not just the Timbrook Family who have been affected by this, who have been hurt by this. To put Eddie Bell to death os going to cause more wounds in another family. It is not going to bring him back. Never.

Again, in a few minutes you are going to do something that is going to be the hardest thing you have ever done in your life.

Ladies and gentlemen, the Judge has done his job. Mr. Thomson and Mr. Abrams, and Mr. Fischel and I have done our job. Now, it is time for you to do yours.

Thank you.

THE COURT: Mr. Thomson?

MR. THOMSON: Briefly, Your Honor. Thank you.

Ladies and gentlemen, as I stated to you, I believe in the opening statement, this is not a capital murder of a police officer where a Defendant rolls up to a stop sign and he gets out of a car and they have a shootout and he kills the officer. He didn't know the officer, all he saw was the uniform. That is a capital murder case, too. **[2427]**

This is a capital murder case of a police officer with many more grave circumstances than what I just described for you. This is a capital murder of a police officer by a Defendant that the evidence shows is a very bad person.

This is the capital murder of a police officer who shows no remorse. The evidence in this case is replete time and time again with this fact.

Edward Bell stayed in that basement after he shot that fine young man in the face for eight hours,

while he laid there, while his fellow officers struggled to revive his life. In one house over Edward Bell sat.

This is not a case, ladies and gentlemen, where after that fellow gets out of the car and he shot and killed an officer and he runs. That is not this case. In this case we are trying a Defendant who can't stand police officers.

I want you to remember back to he testimony from Marlene Combs, the young lady in here who testified before you and Mr. Plummer, her then boyfriend, that rap music was going off, the gunfire was in the background of that car going to Charles **[2428]** Town, Edward Bell was saying not only Sergeant Timbrook's name, but Sergeant Gaither's.

Counsel has ably pointed out to you that hopefully a decision of this magnitude is something many of us will not have to go through again. I implore you ladies and gentlemen, don't heap this on somebody else.

Edward Bell has proven beyond a shadow of a doubt that he hates police officers. He went right into jail and started threatening to kill.

Think about that young lady who testified when she heard the threats, describing the officers body armor and how he would have to shoot him in the head because of it. And, you know what, you know how she felt taking that stand? Not acting on that threat. Not realizing the gravity of that threat, Not ever thinking that she would ever in her life be in a position very similar to the one we are all in today. But, she was here. And we don't want to be here again with Edward Bell.

The relationship that Edward Bell has to authority and law enforcement has absolutely not one shred of mitigation to it. So, I ask you as [2429] counsel have, don't just don't let us go through anything of this magnitude again.

Counsel has stated, in conclusion, that they have been treated nice. And, it is the duty of the State in my opinion as it is every man and woman who wears a uniform to conduct their business and relations as Sergeant Timbrooks' wife stated Sergeant Timbrook did.

But, your decision now is not about who is being treated, which lawyers are being accommodated and how nice those relationships are. Your decision now is about doing what the evidence requires in the capital murder case of a police officer. There is not one shred of evidence in this case in mitigation. If there were, I would point it out to you, because that is my duty as well, as a member of the Bar. It is not here, ladies and gentlemen. It is not here.

So, I ask you to find Edward Bell... you found him guilty of capital murder. And, I am asking you now to impose the death penalty. Like counsel, I don't do it lightly, but it is the right thing to do.

* * *

[2433] THE COURT: All right. Defendant and all counsel are present. I understand we have a verdict from the jury.

Addressing everyone in the courtroom, again, as I did when we had the verdict on the guilty or innocence of the Defendant: I want to assure you that I understand the emotions involved in the case.

I understand the interest in the case. And, I understand it has been a very difficult time over the last year and several months for the families on both sides of this case. But, again, I need to ask you to please maintain the dignity and the order of the courtroom regardless of what this verdict may be. And, I thank you for that. Thank you.

Let's bring the jury in, please.

(Whereupon, the jury returns to the courtroom.)

THE CLERK: Members of the jury have you reached your verdict?

THE FOREMAN: Yes, sir. I have.

THE CLERK: Mr. Foreman, may I have it.

"We, the jury, on the issue joined, having found the Defendant guilty of the unlawful, felonious, wilful, deliberate and premeditated killing **[2434]** of a law enforcement officer, to-wit: Sergeant Ricky Lee Timbrook, when such killing was for the purpose of interfering with the performance of his official duties, and having unanimously found after consideration of his history and background, that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

Signed M. Lee Boppe, Foreperson.

Members of the jury, is the verdict read your verdict, so say you all?

(Affirmative responses.)

THE COURT: Is there a motion at this time?

MR. FISCHEL: Poll the jury.

THE CLERK: Ladies and gentlemen, as we have done previously, the Clerk will call your jury numbers. And, I think all of you remember the number that was assigned to you at the beginning of the case. As your number is called if this is your verdict answer "yes". If it is not your verdict, **[2435]** answer "no".

THE CLERK: Juror Number Two, is the verdict read your verdict?

DENNIS A. GEORGE: Yes, sir.

THE CLERK: Juror Number Seven, is the verdict read your verdict?

JULIA B. WRIGHT: Yes, sir.

THE CLERK: Juror Number Nine, is the verdict read your verdict?

MARY J. HUTCHINGS: Yes, sir.

THE CLERK: Juror Number Ten, is the verdict read your verdict?

JEANNIE B. BATTAILE: Yes, sir.

THE CLERK: Juror Number Eleven, is the verdict read your verdict?

CONNIE P. GREER: Yes,sir.

THE CLERK: Juror Number Twenty-Six, is the verdict read your verdict?

MARY E. HORNE: Yes, sir.

THE CLERK: Juror Number Twenty-Seven, is the verdict read your verdict?

ROGER J. FEIGHT: yes, sir.

THE CLERK: Juror Number 28, is the **[2436]** verdict read your verdict?

AMANDA W. WHITACRE: Yes, sir.

THE CLERK: Juror Number Twenty-Nine, is the verdict read your verdict?

HILDA V. MILLER: Yes, sir.

THE CLERK: Juror Number Thirty-One, is the verdict read your verdict?

CAROLYN M. HAWKS: Yes, sir.

THE CLERK: Juror Number Forty-One, is the verdict read your verdict?

LAURA D. FOGLE: Yes, sir.

THE CLERK: Juror Number Fifty-One, is the verdict read your verdict?

MARTIN L. BOPPE: Yes, sir.

THE CLERK: Have all of the jurors been polled?

(Affirmative responses.)

THE CLERK: The jury has been polled.

THE COURT: Is there anything else before I discharge this jury?

MR. FISCHEL: No, sir.

* * *

COMMONWEALTH OF VIRGINIA
CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA v. EDWARD NATHANIEL BELL

COMMONWEALTH EXHIBITS: Submitted-

EXHIBIT			PAGE
✓	1	District Court Warrant	1
✓	2.	Conviction order, Circuit Court, 1997	2
✓	3.	Request & witness summons for Timbrook	3-4
✓	4.	INS documents (collective packet)	5-36
✓	5.	2 photographs of 1997 Cavalier	37
✓	6.	DMV Title application of Michael Johnson	38
✓	7.	Certificate of Analysis (11/8/99)	39
✓	8b.	Transcript of Bell statement	40-65
✓	12b.	Transcript of 9-1-1 Tape (Exhibit 12)	66-122
✓	14.	Autopsy report	123
✓	65c.	Certificate of Analysis (11/12/99)	124
✓	66	Instruction sheet for gun residue tests, dated 1996	126
✓	98B.	Certificate of Analysis, dated November9, 1999	127-128
✓	98C.	Certificate of Analysis, dated January 21, 2000	129-130
✓	200.	Photo of rear of 305 E. Picadilly Street	131

✓	201. Photo, rear porch 305 E. Picadilly Street	132
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✓	203. Photo, close-up beneath porch, 305 E. Picadilly Street	134
✓	204. Photo- close up of gun showing barrel	135
✓	205. Photo- close-up with evidence marker	136
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✓	213. Photo, Map showing Police Car 118	139
✓	214. Photo- aerial showing 301-315 E. Picadilly	140
✓	215. Photo showing 301-305 E. Picadilly	141
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✓	239.	Photo, Bell's possessions in basement	160
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✓	263.	Photo, duplicate of Commonwealth Exhibit 4 (automobile)	162
✓	270.	Photo, x-ray bullet fragments from autopsy	163
✓	271.	Photo, autopsy close-up of wounds	164
✓	272.	Photo, autopsy photo of face with blood	164
✓	273.	Photo, autopsy photo of face, no blood	165

✓	274.	Photo, autopsy photo of removed bullet fragment	165
✓	277.	Photo, autopsy photo, close-up of wound with ruler	166
✓	300.	Prior conviction record of Edward Nathaniel Bell.	167-189
✓	301.	Police records from Jamaica on Edward N. Bell	190-194

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✓	Z.	Transcript of 9-1-1 tapes	219-236

[Virginia Circuit Court for the City of Winchester]

[Jury Instructions Given on January 26, 2001]

* * *

INSTRUCTION NO.: 26

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount. [Material stricken out.] Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance:

> That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

Any decision you make regarding punishment must be unanimous.

* * *

INSTRUCTION NO.: 28

If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.

* * *

Virginia Department of Corrections

Presentence Investigation Report

Offender Information

District Number: F11
Prepared by: J. Michael Spory
Date of Sentencing: May 30, 2001
Date Prepared: May 18, 2001

Offender Summary	Offender's Name (Last, First, Middle) Bell, Edward Nathaniel	
Nickname/Street Name Eddie, Jamaican Eddie	Alias: Bell, E B Edward	Maiden Name
Race Black	Sex Male	
Place of Birth (City or County) LOC/State Jamaica 888 JM		
Age 36	Date of Birth 09/12/1964	
* * *		
Permanent Address 211 Kimberly Way, Winchest, VA 22601		
Local Address (if different)		
* * *		

OFFENSE INFORMATION

Docket Number	Offense at Indictment	Offense Code (VCC)	Plea Per Offense
1. CR99000478	Capital murder, law enforcement officer	MUR0923F1	not guilty
2. CR00000002	Possession w/intent to sell, etc. Schedule I or II drugs	NAR3043F9	not guilty
3. CR00000003	Possess Sch. I/II drug while possessing firearm	WPN5243F6	not guilty
4. CR99000489	Firearm use in commission of felony-(first offense)	ASL1319F9	not guilty

Offense at Conviction	Offense Code (VCC)	Plea Agreement	Virginia Code Section
1. Capital murder, law enforcement officer	MUR0923F1	no	18.2-31(6)
2. Possession w/intent to sell, etc. Schedule I or II drugs	NAR3043F9	no	18.2-248(C)
3. Possess Sch. I/II drug while possessing firearm	WPN5243F6	no	18.2-308.4(A)
4. Firearm use in commission of felony-(first offense)	ASL1319F9	no	18.2-53.1

* * * *

* * * *

Offense Version

During the evening of October 29, 1999, Intensive Probation Officer Brad Triplett and regular Probation Officer Bill Whited were participating in Community Oriented Probation and Parole Services (COPPS) activities with Winchester Police Sergeant Ricky Timbrook. They visited the homes of numerous offenders, made sure no offenders were in the Stay Out of Drug Areas, did curfew checks, and served a parole violation arrest warrant on one offender. Several times they had gone by an offender's apartment in an attempt to serve a violation warrant on him. Around 11:30 PM they made one more attempt to serve the warrant. They pulled the car into the parking lot and saw two people in the yard adjacent to the residence. They began talking to one person who met a partial description of the wanted offender. When a light was shined into that person's face to identify him, the other unknown individual began to run. Sergeant Timbrook gave chase. Probation Officer Brad Triplet did not follow directly, but chose to run around the block in order to assist from another direction. Probation Officer Bill Whited stayed with the car and the unidentified subject.

The foot chase went several directions and ended up going between two houses facing Piccadilly Street. As Sergeant Timbrook came through those two houses, he was shot in the face. Police Officers who were responding to the foot chase got to Sergeant Timbrook almost immediately. The area was quickly surrounded and a perimeter was set up.

Later the next morning, various law enforcement officers were conducting a door to door search trying to find a suspect. The defendant was found hiding in the basement of a nearby home. Found on his person was a metal lighter that contained five packets of an off-white chunky material prepared for resale. Laboratory analysis determined that the material was cocaine in the amount of .966 grams. The lighter also had cocaine residue.

A witness has since indicated that earlier in the evening of October 29 that he approached the defendant in an attempt to purchase marijuana. The defendant only had cocaine. He showed the witness a gun during their discussion. After the gun was recovered by police, the witness identified the gun as being identical to the one the defendant had shown him that evening.

Offender's Version

Mr. Bell maintains his plea of not guilty. He did indicate to this Officer that he had been in Charles Town, West Virginia attending the horse races, and had returned to Winchester around 10:30 PM.

In a statement taken shortly after his arrest, he said he ran after he saw a car coming quickly toward him. He admitted to running, but denied any knowledge of the shooting. He first said that after he heard the gunshot that he tried to hide under a car. Unable to get under the car, he knocked out a window in the basement of a house, and hid there. Later in the statement he said he was already in the basement when he heard the shot.

Jail Adjustment

Jail staff reported several incidents of threats and intimidation from the defendant. Since the jury verdicts, Mr. Bell's adjustment has been uneventful.

* * * *

Most Recent and Serious Prior Criminal Adult Convictions:

Description	Offense Code (VCC)
1. Resisting arrest, obstructing justice by threats or force	JUS4828M1
2. Contempt of Court – general, without a jury	CON3210S9
3. Drive without a license	LIC6808M2
4. Uninsured vehicle, operate	LIC6806M3
5. Carry concealed weapon	WPN5202M1

* * * *

Mr. Bell has been on a $3500 Surety bond through INS since at least October 9, 1998. On June 28, 1999, he was placed on a one year unsupervised probation period by the Winchester Circuit Court due to an appealed misdemeanor conviction of Show Cause.

* * * *

MARITAL/RESIDENTIAL STABILITY	Number of Dependents 5
Marital Status	

□ Single/Never Married X Married □ Separated □ Divorced □ Widowed □ Divorced/Remarried □ Widowed/Remarried □ Other	
Living Status □ Alone □ Single Parent/Head of House □ With Spouse □ With Parents/Other Relative X Other	
Length of Residence at Current Address Years 0 Months 3	Length of Residence in Local Area Years 7 Months 0
Length of Residence Apart from Parents Years 5 Months 6	Has Any Member of Offender's Family Ever Been Convicted of a Felony? No
Spouse Name/Address Barbara Bell Portland, JM	

Narrative of Family/ Environmental Information

Family History

Mr. Bell was born and raised in Jamaica. He came to the United States briefly before returning in 1992 to live. He is one of twelve children. His mother and father now live in Winchester, as do four sisters and one brother. One sister is deceased. Mr. Bell reports that no family members have felony records. This Officer made two attempts to talk to Mr. Bell's family, but the calls were never returned.

Marital History

Mr. Bell has fathered five children with three different women. He married his wife, Barbara Bell, in 1993. she is a teacher living in Jamaica with Kamille, born on December 11, 1992.

A daughter, Kydesha Bell, was born on October 14, 1994 to Dawn Jones of Martinsburg, West Virginia.

Three boys were born to his union with Tracy Nicholson of Winchester. Edward N. Bell, Jr. was born on April 25, 1997. Xavian E. Bell was born on May 7, 1998. Diontre T. Bell was born on July 17, 1999. Ms. Nicholson relates that she and Mr. Bell lived together for most of six years. Mr. Bell indicated that he generally lived with the mothers of his children, in either Winchester or Martinsburg. Ms. Nicholson said that Mr. Bell had essentially moved out several months before the offenses occurred. His clothes were still at her residence, but he did not stay overnight anymore. She indicated that he did come by to visit the children at least once or twice a week. Though he paid no child support, he would provide some needed items weekly.

She said that Mr. Bell never assaulted her, though she said they had arguments that sometimes included pushing each other. When this Officer referred to police reports that claimed otherwise, she continued to deny such reports.

* * * *

Highest Education Achievement Years	Name/Location of Last School Attended

10 years	Brown Brook Secondary School: Portland, Jamaica

Education Narrative

Mr. Bell indicates he last attended school in 1984. he reports getting average grades. He also claims that he had no attendance or disciplinary problems. He has not attempted to get a GED.

* * * *

SOCIAL/ RELIGIOUS ACTIVITIES	Social Activities □ None Specified X Constructive □ Non Constructive
Religion X Active □ Inactive □ None	
Religious Preference X Protestant □ Catholic □ Jewish □ Other □ Muslim □ Unknown □ No preference	

Social/Religious Activities Narrative

Mr. Bell reports that he enjoys playing soccer and cricket, and attending the horse races in Charles Town, West Virginia. He admits to playing the slot machines there on occasion.

He says he attends church on a regular basis. He is a member of the Church of Christ. A deceased sister was a deacon in the church. He claims to read his Bible daily.

* * * *

EMPLOYMENT HISTORY	Employment at Time of Offense □ Full Time X Part Time □ Full Time Student □ Housewife □ Retired/Disabled □ Unemployed	
Type of Employment □ Skilled □ Semi-skilled X Unskilled □ Student □ N/A	Description of Occupation LABORER, COMMON	Occupation Code 600
Length of Longest Employment Years 1 Months 10 □ N/A	Longest Employment Period Within Past Two Years Years 0 Months 7	
Employment Record Over Past Two Years □ Regular, Few Changes □ Regular, Many Changes □ Irregular X Odd Jobs Only □ No Work Record		

Employment History Narrative

At the time of the offense, Mr. Bell says he was working part time assisting his father.

He was employed at **Shockley Brothers, Inc.** from May 27, 1999 until July 29, 1999. He was terminated for unsatisfactory work performance, tardiness, and for exhibiting a disruptive attitude. His total earnings were $3012.77.

Mr. Bell worked for the temp agency **Addeco** from October 22, 1998 to November 16, 1998. He was sent to three different employers. He had frequent no shows without calling in. he is not eligible for rehire. In 1998 his total earnings were $326.38.

Social Security records also indicate employment through **Addeco** in 1997 with earnings of $642.25. **Addeco** did not have records available to confirm the employment in 1997.

Mr. Bell was employed for **Midwesco** from August 21, 1997 until April 2, 1998.

He was terminated for refusing to obey a supervisor's instruction, for committing an immoral act at work, for purposely restricting production, and for fighting or provoking fighting. He had problems with work attendance. It was noted that he was always creating problems at work, primarily through his use of intimidation. His earnings in 1997 totaled $6785.68, and $433.27 in 1998. he is not eligible for rehire.

According to Social Security records, he was employed for **AES**, a temp agency, in 1993, 1994, and 1999. His 1993 earnings were $3437.68, his 1994 earnings were $96, and his 1999 earnings were $1424.43. he last worked through **AES** in March and April 1999. **AES** computer records are not available prior to 1995. there was a note in the file indicated that he had been referred to work at **General Electric** in 1993. In 1999 he was terminated from a placement for being argumentative with a supervisor and for poor job performance. When an **AES** employee related this to Mr. Bell, he exhibited a bad attitude to her and disagreed with that analysis for over an hour. This was similar to the behavior that was displayed at the job where he had been placed. He is not eligible for rehire.

He was employed with **Southeastern Container Inc.** in 1995, 1996, and in 1997. He earned $14,700.37 in 1995, $23,718.09 in 1996, and $2668.13 in 1997. He began work on April 7, 1995 and was terminated on February 8, 1997. After a fork lift accident, he was required to submit to a urine screen per company policy. He falsified the screen and provided a sample below 90 degrees. When asked to empty his pockets and to submit to a second urine, he became belligerent and refused. He then walked off the job. Reports indicate that Mr. Bell and another fork lift driver tried to pass through the same tight area. After the minor collision, heated words were apparently exchanged. No physical altercation developed. Mr. Bell had been reprimanded several times for tardiness. He is not eligible for rehire.

Mr. Bell was employed with **Rocco** in 1994 and 1995. According to a Social Security printout, his earnings in 1994 were $13,708 and $4147.71 in 1995. **Rocco** records only go back three years, therefore confirmation of dates of employment and work performance were unavailable. His supervisor no longer worked there as well.

He worked for Smalley's **Packing** from May 17, 1993 to December 13, 1993. He quit on his own. His total earnings were $5846.47.

Mr. Bell reported that he worked for a year for a cruise line in 1991. He did not enter the United States until 1992.

FINANCIAL STATUS	Residence □ Owner □ Rent X Other

Checking Account	Savings Account	Gross Monthly Income Claimed
No	No	Varies

Total Indebtedness Claimed	Total Monthly Payments Claimed
Unknown	$0.00

Source(s) of Subsistence
X Job □ Public Assistance □ Spouse X Family □ Other □ None

Financial Status Narrative

Mr. Bell claims to have no outstanding bills. He did have a car loan, but understands the car was repossessed after his incarceration. He reports that he has not received any public assistance.

HEALTH INFORMATION	Physical Health Condition □ Good X Fair □ Poor

Physical Handicaps	Mental Health Treatment	Mental Health Commitment
No	No	No

Types of Mental Health Treatment	Type(s) of Mental Health Commitment
□ In-Patient □ Out-Patient X N/A	□ Involuntary □ Court-Ordered Evaluation □ Voluntary X N/A

Drug Use Claimed	Drug Use Apparent	Drug Treatment
□ None Used X Heavy Use □ Moderate Use □ Occasional Use □ Extent Unknown	Yes	No
Types of Substances Claimed □ Not Used □ Hallucinogens □ Heroin □ Opium □ Cocaine □ Synthetic Narcotics X Marijuana □ Amphetamines □ Barbiturates □ Type Unknown □ N/A		
Alcohol Use Claimed	Alcohol Abuse Apparent	Alcohol Treatment
□ Not Used □ Heavy Use X Moderate Use □ Occasional Use □ Extent Unknown	Yes	No
Height 5 Ft. 10 In.	Weight 198 lbs.	

* * *

Health Information

Mr. Bell reports bad headaches and difficulty sleeping as a result of an alleged incident at the jail. He also thinks he may have possible heart problems. He says he has no life threatening illnesses.

Substance and Alcohol History

Mr. Bell says his drug of choice is marijuana. He started this use at age 6 or 7. He says he has smoked it regularly since then. He smokes marijuana daily, if it is available. He stated he used

marijuana the day of the instant offenses. He denies ever distributing drugs to support his habit.

He says he started drinking alcohol at age 3 or 4. He has been drinking regularly since age 9 or 10. He prefers beer. During the week he drinks 2 to 3 beers a day. On the weekends he drinks a six pack daily. His use depends on whether he has money to purchase the alcohol.

* * * *

* * * *

Criminal History Narrative

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
01/25/1985(A)	Portland, Jamaica	1) Destruction of Property	Destruction of Property	02/28/1985	1) $26 for shirt, $50 Fines or 10 days in Jail
		2) Unlawful Wounding	n/a	02/28/1985	2) dismissed
		3) Assault	Assault	02/28/1985	3) $80 fines or 10 days in jail
		4) Assault	n/a	02/28/1985	4) dismissed
05/05/1994(A)	Winchester Gen. Dist. Court	Speeding 48/35	Speeding 48/35	06/08/1994	$65 fines and costs

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
10/15/1995(A)	Frederick Gen. Dist. Court	Reckless Driving	Reckless Driving	11/20/1995	$214 fines and costs
12/31/1995(A)	Winchester Gen. Dist. Court	Speeding 58/40	Speeding 58/40	02/21/1996	$83 fines and costs
12/06/1996(A)	South Carolina	Speeding 20 mph or above	Speeding 20 mph or above	12/17/1996	fines and costs
05/16/1997(O)	Winchester Circuit Court	Concealed Weapon	Concealed Weapon	08/26/1997	$293 fines and costs
07/01/1997(A)	West Virginia	1) Brandishing Firearm	n/a	01/28/1999	1) dismissed
		2) Battery	n/a	01/28/1999	2) dismissed
07/05/1997(O)	Clarke Gen. Dist. Court	1) Radar Detector	Radar Detector	07/23/1997	1) $42 fines and costs

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
		2) Speeding 65/55	Speeding 65/55	07/23/1997	2) $60 fines and costs
08/15/1997(A)	Winchester Gen. Dist. Court	1) Deface-Alter Serial Number	n/a	12/03/1997	1) nolle prossed
		2) Concealed Weapon	n/a	12/03/1997	2) nolle prossed
08/15/1997(A)	Winchester GDC Gen. Dist. Court	No Liability Insurance	No Liability Insurance	12/03/1997	$180 fines and costs
09/20/1997(A)	Frederick Gen. Dist. Court	Expired Registration	Expired Registra-tion	11/17/1997	$70 fines and costs
12/18/1997(A)	Winchester Gen. Dist. Court	1) Drive While Suspended	n/a	03/04/1998	1) nolle prossed

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
		2) No City Sticker	No City Sticker	03/04/1998	2) $60 fines and costs
04/18/1998(A)	Winchester Gen. Dist. Court	1) Improper Registration	Improper Registration	06/10/1998	1) $75 fines and costs
		2) No Inspection	No Inspection	06/10/1998	2) $27 fines and costs
05/24/1998(A)	Clarke Gen. Dist. Court	1) No City Sticker – Winchester	No City Sticker – Winchester	06/04/1998	1) $55 fines and costs

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
		2) No Valid Driver's License	No Valid Driver's License	07/02/1998	2) 90 days jail, suspended; $540 fines and costs
06/18/1998(A)	Winchester Gen. Dist. Court	Drive While Suspended	n/a	10/14/1998	nolle prossed
04/14/1999(O)	Winchester Circuit Court	Show Cause	Show Cause	06/28/1999	6 months jail, suspended; 1 year unsupervised probation, $61 costs
04/30/1999(A)	Jefferson Co. West Virginia	1) Drive on Suspended License	Drive on Suspended License	07/06/1999	1) $117 fines and costs

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
		2) Speeding 20 mph or Above	Speeding 20 mph or above	07/06/1999	2) $117 fines and costs
		3) Giving False Informa-tion	Giving False Informa-tion	07/06/1999	3) $92 fines and costs
		4) Fleeing from Officer	Fleeing from Officer	07/06/1999	4) $117 fines and costs
10/29/1999(O)	Winchester Gen. Dist. Court	Destruction of Property	n/a	12/20/1999	nolle prossed
10/29/1999 (O)	**Winches-ter Circuit Court**	**1) Use of Firearm to Commit Felony**	**Use of Firearm to Commit Felony**	**05/30/2001**	**1) Instant Offense**

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
		2) Capital Murder of Police Officer	**Capital Murder of Police Officer**	**05/30/2001**	**2) Instant Offense**
		3) Possess Cocaine with the Intent to Distri-bute	**Possess Cocaine with the Intent to Distri-bute**	**05/30/2001**	**3) Instant Offense**
		4) Possess Cocaine with a Firearm	**Possess Cocaine with a Firearm**	**05/30/2001**	**4) Instant Offense**

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

v **Docket No. 99-CR-478, 489, 2000-CR-2-3**

Edward Nathaniel Bell

SENTENCING ORDER

On May 30, 2001 came Paul Thomson, Esquire, THE Attorney for the Commonwealth Marc Abrams, Esquire, Assistant Attorney for the Commonwealth and the accused, who appeared in person with Jud Fischel, Esquire and Mark Williams, Esquire, Esquire, his attorneys. A court reporter was present and duly sworn.

A motion to set aside the jury verdict in case 99-CR-478 having been filed, the Court proceeded to hear argument of counsel. After careful review of the motion and argument of counsel, the Court did deny the motion and did note the objection of the attorneys for the defendant.

The charge in case 99-CR-378 being one of capital murder and the jury having returned a verdict recommending death, and Victim Impact Statements having been filed in the case and certain victims being present to testify, the Court did receive the Victim Impact Statements as a part of the record and did direct that they be filed.

The Court did then hear the defendant's allocution and recessed. The Court did return to open Court to pronounce sentence. Having earlier been found guilty in these indictments by a Felony Jury, the Court proceeded to hear argument of counsel. The Court did note that the jury verdict in case 2000-CR-3 as to punishment recommended by the jury had been set aside and the Court was to fix the punishment in this case without a jury recommendation. The pre-sentence report filed herein was made a part of the record and the Court did note that no Sentencing Guidelines had been filed as the one case was a case of Capital Murder. The Court then inquired of the defendant if there was any reason judgment and sentenced should not now be pronounced, and nothing being offered or alleged in delay, the Court did adjudge the defendant guilty of each of the charges in these cases and did fix punishment as follows and did Order that the costs of the prosecution be assessed:

SENTENCE

Docket No.	Crime & Offense Date	Sentence
99-CR-489	Use of a firearm in a felony 18.2-53.1 (10/29/99)	3 years in the penitentiary
2000-CR-2	Possess of cocaine with intent 18.2-248(c)(10/29/99)	10 years $5000 fine

2000-CR-3	Possess cocaine with firearm 18.2-308.4 (10/29/99)	5 years
99-CR-469	Capital Murder of police officer 18.1-32(6)(10/29/99)	DEATH

CONSECUTIVE SENTENCES

The sentences imposed in cases 99-CR-489, 2000-CR-2 and 2000-CR-3 shall run consecutively to each other.

JAIL CREDIT

The defendant shall be given credit for all time spent in custody awaiting disposition on these charges.

The defendant shall complete any substance abuse screening, assessment, testing and treatment as directed by the Department of Corrections and he is subject to payment of any fees associated with the treatment or intervention on an ability to pay basis.

Pursuant to Virginia Code Section 53.1-232, The Court did set as the date for the Execution ordered in case 99-CR-478 to be August 30, 2001, subject to any appeals or other judicial proceedings.

The Court did find the defendant was indigent for the purposes of noting an appeal in these cases and did appoint Jud Fischel, Esquire and Mark Williams, Esquire, as attorneys to represent him for the purposes of filing any appeals. Once a Notice of

Appeal is filed herein, the Court ORDERS that the transcript of all proceedings shall be prepared and filed herein as a part of the record.

DEFENDANT'S STATUS

The defendant is remanded to Jailor of the City of Winchester to be transported to the Department of Corrections at the location they designate.

A copy of this order shall be delivered to the attorney for the defendant and the attorney shall ten days from date of entry of the order to file any written objections to any portions not covered by objections previously noted in the record of these proceedings.

Entered on June 12, 2001

/s/ Dennis L. Hupp
DENNIS L. HUPP,
JUDGE

DEFENDANT'S IDENTIFICATION:

Alias: Bell, E B Edward DOB: 9/12/1964
SS# 223-67-0613 SEX: Male
TOTAL TIME IMPOSED: 18 years and DEATH
TOTAL TIME SUSPENDED: None
TOTAL TIME TO SERVE: 18 years and DEATH

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL, Petitioner	)	
	v.)	Record No. _____
	)	(capital habeas
PAGE TRUE, WARDEN Sussex State Prison, Respondent	)	proceeding)

AFFIDAVIT

I, Barbara Williams, being duly sworn, state the following upon my information and belief:

1) I ~~am~~ [handwritten: was] Edward Bell's wife.

2) We were married in 1993.

3) We lived together from 1987 until 1992, when Eddie moved to the United States.

4) We have a daughter, Kamille, who was born in 1991.

5) Eddie was a very loving and caring father and has an excellent relationship with Kamille.

6) In the past, Eddie helped financially support Kamille.

7) When we lived together, we lived with Eddie's parents at his home.

8) I have never known Eddie to live independently, or on his own.

9) All of the jobs that Eddie worked at were manual labor such as brick laying and hair cutting.

10) Eddie did not really attend much school after the 9th grade – he was never really interested in

getting back into school after the 9th grade in Jamaica.

11) Eddie's trial attorneys never interviewed me and I was never asked to testify at his trial. If asked, I would have been willing to come and testify.

[Handwritten:]

12) Eddie's nickname is Nattyslow because he is quite slow.

13) He was a student below average grade.

14) Eddie's mother told me that she always had to wake him up in the morning and prepare his lunch because he was always late.

[End handwritten portion]

Signed this day of March, 2003, under the pain and penalty of perjury.

/s/ Barbara Williams
Barbara Williams

JAMAICA

PARISH/COUNTY/CITY OF PORTLAND.

SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, this 10 day of March, 2003.

ELAINE M. BOWALE J.P.
Notary or JP

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL, Petitioner	)	
	)	
v.	)	Record No.
	)	
PAGE TRUE, WARDEN, Sussex State Prison,	)	
	)	
Respondent	)	

AFFIDAVIT

I, Tracy Nicholson Evans, do depose and state the following upon my information and belief:

1) I am over 18-years old and competent.

[Handwritten material:]

2) I am the mother of three of Edward Bell's children. Eddy was a very involved and loving father. Eddy was never violent with me or the kids. Billie Jo Swartz told a story at trial involving me and her. The incident was because I was trying to get at her for chasing Eddy. Eddy stopped me from getting at her but he was never violent with either of us and, although I climbed on the car to try to get at Billie Jo, while the car was moving, he stopped the car to avoid hurting me. Eddie did not have a gun with him.

I was interviewed once or twice by the trial attorneys, but only to help them with little stuff, like how to find witnesses.

I wanted to, and expected to, testify trial. I was available but the attorneys did not talk to me about it.

[continued on reverse side of paper]

Eddie worked a full-time job almost the whole 6+ years we were together and I was a stay at home mom. Eddie financially supported the kids the whole time and gave the kids anything they needed (the oldest was 2½, then 1½, then 3 months). Sometimes he'd come home with 5 bags of diapers at a time, because he was concerned about providing and didn't know if he'd have sufficient money.

[end of back page material]

I declare under penalty of perjury that the foregoing is true and correct, signed this 6th day of March, 2003.

/s/ Tracy Nicholson
Name: Tracy Nicholson

COMMONWEALTH OF VIRGINIA
COUNTY/CITY OF Winchester.

SUBSCRIBED and SWORN before me in the jurisdiction aforesaid, this 6th day of March, 2003.

/s/ Jonathan Sheldon
Notary Public:
My Commission Expires:

[seal omitted]

JONATHAN P. SHELDON
NOTARY PUBLIC
COMMONWEALTH
OF VIRGINIA
My Commission Expires
September 30, 2006

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL, Petitioner	)	
	)	
v.	)	Record No. _____
	)	
PAGE TRUE, WARDEN, Sussex State Prison,	)	
	)	
Respondent	)	

AFFIDAVIT

I, Joanne Nicholson, do depose and state the following upon my information and belief:

1) I am over 18-years old and competent.

[Handwritten material:]

2) I am the grandmother of three of Edward Bell's children. I lived with my daughter (the children's mother) and Eddie Bell continuously for more than two years. During that time I observed that Eddie was a very good father, he was loving and protective. He always made sure there were milk and pampers in the house. He was often up early in the morning before, anyone else, to get bottles ready for the babies. Sometimes he and Tracie (my daughter, the kids' mother) would argue, sometimes loudly, but Eddie was never violent with Tracie, he never hit her. Sometimes I would tell Eddie and Tracie to be quiet and Eddie would always obey me. Eddie would often consult with me on how he could get along better with Tracie, he worked hard at the relationship.

Eddie was present for the birth of all his kids – I remember him crying at the birth of his first son. He changed about as much diapers as Tracie. I also remember when Eddy gave his son his first haircut. Eddy put him in a high

[continued on reverse side of paper] chair and used some clippers. Eddy was very upset when he mistakenly nicked his son's head.

I also worked with Eddy at the plant for more than a year. Eddy worked hard and he was well liked there.

I was interviewed once by Eddie's trial attorneys. They never asked me personal thinks, like this, about Eddy. ~~They~~ Mark Williams only asked me about the guilt/innocence witnesses. I thought I was going to testify and I came to court almost every day, but they never called me.

Billie Jo Swartz lied during her penalty phase testimony. Billie Jo's kin, who I was friends with, called ~~me~~ Tracie one day to tell ~~me~~ her that Billie Jo was after Eddie. I drove Tracie over there and we encountered Eddie and Billie Jo outside the house. Tracie went after Billie Jo and Eddy pushed Tracie away, to break up the fight. Billie Jo jumped in Eddy's car to protect herself from Tracie. Because the girls were getting out of hand and because Tracie was pregnant I made Tracie come home with me. We left Eddy and Billie Jo sitting in the car. Eddy did not have a gun and I have never seen him with a gun. I never saw Eddy touch Billie Jo.

I have read front and back
/s/ Joanne Nicholson

[End of back page and end of handwritten material.]

I declare under penalty of perjury that the foregoing is true and correct, signed this 6 day of March, 2003.

/s/ Joanne Nicholson
Name: Joanne Nicholson

COMMONWEALTH OF VIRGINIA
COUNTY/CITY OF Winchester
SUBSCRIBED and SWORN before me in the jurisdiction aforesaid, this 6th day of March, 2003.

/s/ Jonathan Sheldon
Notary Public:
My Commission Expires:

[seal omitted]

JONATHAN P. SHELDON
NOTARY PUBLIC
COMMONWEALTH
OF VIRGINIA
My Commission Expires
September 30, 2006

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL,	)	
Petitioner	)	
	v.)	Record No. _____
	)	(capital habeas
PAGE TRUE, WARDEN	)	proceeding)
Sussex State Prison,	)	
Respondent.	)	

AFFIDAVIT

I, Dawn Jones, being duly sworn, state the following upon my information and belief:

1) I dated Edward Bell shortly after he arrived in the United States from Jamaica.
2) Eddie and I had a daughter together, her name is Kydesha and she is 8 years old.
3) Eddie was always a very good father. He was very loving and affectionate.
4) When Kydesha was born, she was premature. She had to stay in the hospital for some time. I was also in the hospital for several days at that time. While I was in the hospital, I hadn't seen Eddie for some time and I was calling all over town trying to find him. Eventually a nurse came and told me that Eddie had been sitting by Kydesha's bedside the whole time.
5) After we broke up, Eddie would take Kydesha for weekends and I would have her during the week.
6) Eddie helped support Kydesha financially.
7) Eddie's trial lawyers never interviewed me.

8) I felt harassed, intimidated and pressured by the police when they approached me several times to testify.
9) Ultimately, I was subpoenned to testify for the prosecution at the penalty phase of Eddie's trial, regarding an incident when Eddie possessed a gun.
10) Eddie's attorneys did not ask me any questions when I testified.
11) I was very surprised because I wanted to testify on Eddie's behalf and I would have testified to the above.

Signed this ____ day of March, 2003, under the pain and penalty of perjury.

_____
Dawn Jones

COMMONWEALTH OF VIRGINIA
COUNTY/CITY OF _____, SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, this ____ day of March, 2003.

_____
Notary Public:
My Commission Expires:

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL,)
Petitioner)
v.) Record No. __ (capital habeas
)
proceeding)
PAGE TRUE,)
WARDEN)
Sussex State Prison,)
Respondent)

AFFIDAVIT

I, Marie Deans, being duly sworn, state the following upon my information and belief:

1) I have worked on over 200 capital cases as a mitigation investigator.
2) I am familiar with Jamaica and their patois (or way of speaking).
3) I know that street or "pet" names are very important and used by most Jamaicans.
4) Lloyd Snook asked me to work on this case in January, 2000, for a May, 2000, trial.
5) I was appointed to his case in February, 2000.
6) Shortly thereafter, I visited Mr. Bell for a two-hour interview.
7) Mr. Bell was unable to give me sufficient family contact information at that time, he was extremely slow in imparting information.
8) It was clear that something was wrong with Eddie's cognitive abilities.

9) In addition, apart from his accent, I noted that Mr. Bell had a peculiar way of speaking that I suspected from my experience was a sign of neurological damage.
10) I told this to Lloyd Snook.
11) I asked Mr. Snook many times to get me phone numbers and addresses for Mr. Bell's family so that I could begin my investigation.
12) I tried to contact Mr. Snook but I never heard from him.
13) When May approached I did not have sufficient time to perform an investigation, so I wrote Mr. Snook a letter stating that I should withdraw from the case.
14) I received a message some time later from Mr. Fischel's office requesting my contact information and called back providing it, but I never heard from Mr. Fischel again.
15) Regarding trial counsel and the mitigation investigation, this was the most disorganized case that I have ever attempted to work on.

Signed this 12 day of March, 2003, under the pain and penalty of perjury.

/s/Marie Deans
Marie Deans

COMMONWEALTH OF VIRGINIA

COUNTY/CITY OF Albemarle, SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, this 12 day of March, 2003.

/s/ [illegible]
Notary Public:
My Commission Expires:
5/31/2006

[seal omitted]

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL, Petitioner	)	
v.	)	Record No. (capital habeas proceeding)
PAGE TRUE, WARDEN Sussex State Prison, Respondent	)	

AFFIDAVIT

I, Jud A. Fischel, being duly sworn, state the following upon my information and belief:

1) I represented Edward N. Bell in the trial of this case.

2) Mr. Bell had trouble understanding what was relevant in his case and he often could not respond with relevant and helpful information to my requests.

3) I had difficulties communicating with Mr. Bell which I had attributed to his dialect, since he grew up in a rural area of Jamaica. In retrospect I am now very concerned that he suffers an underlying neurological problem that was never considered, which is the actual basis for this difficulty.

4) I found it difficult to keep Mr. Bell focused on what was relevant. Mr. Bell was very hard to get him to understand me. He was trying to assist me, but it was very frustrating to work with him.

5) I could not find any common ground to talk with Mr. Bell about. His social skills were so poor that I'd say he had close to no social skills.

6) I was the lead counsel, and concentrated on guilt phase issues. Co-counsel Mark Williams was primarily responsible for preparing the sentencing phase of the trial. I allowed Mr. Williams to develop the strategy for the mitigation portion of the case. However, we did consult with each other in this regard.

7) The only information I received from Lloyd Snook regarding any existing mitigation investigation was that Bell may have a neurological problem.

8) I never contacted or received anything from Marie Deans.

9) I was denied a motion for a continuance when I wanted to further investigate firearms and witness issues, so I did not have sufficient time to investigate or interview every witness and follow up on every lead that was necessary to the case.

10) I hired an investigator at one point to help interview witnesses, but he never did anything, never billed me, and I did not hire another investigator. I did not hire a mitigation investigator. I wish that I had continued with Marie Deans.

11) Edward Bell was made to wear a leg chain, or shackles, during voir dire. There was no

hearing on the necessity for restraining Mr. Bell.

12) There was also no question that the jury could see the shackles. Thus, we objected to Judge Hupp in chambers and Judge Hupp made phone calls in which he requested that "leg weights" be used instead. Edward Bell was not present for this discussion.

13) The leg weights were put on Mr. Bell after some of the voir dire was complete.

14) During the trial, we had off-the-record legal discussions in chambers with Judge Hupp and Commonwealth. Bell was not present for these discussions.

15) After the Commonwealth rested its case, it requested permission to reopen because a Commonwealth witness, Terry Lee Johnson, had not been sworn. We strongly objected, but the Judge ruled that the Commonwealth could reopen its case for this purpose. This entire discussion happened in chambers, was not on the record, and Mr. Bell was not present. Initially Judge Hupp agreed with the defense, but changed his mind without explanation, what appears on the record does not reflect what happened in chambers.

16) I did not review the police reports regarding Mr. Bell's prior conviction for carrying a concealed weapon.

17) Mark Williams never told me that Mr. Bell had given the name of a witness that had overheard statements made by

Commonwealth witness Terry Lee Johnson. I did not know that Greg Roberts overhead Johnson say that he (Johnson) knew nothing about the case and I would have called Roberts to testify had I known that.

18) I was not given any information on Terry Lee Johnson from the Commonwealth except for Mr. Johnson's criminal record.

19) I told Mr. Bell at guilt innocence that he wasn't going to testify because of his criminal history. I did not advise Mr. Bell on his right to testify at the punishment phase of trial.

20) It was clear to me that two the older jurors were nodding off during the trial.

21) I assumed — because I was so told by Commonwealth Attorney Thompson — that I was provided everything under the Commonwealth's open file policy.

22) Two things nagged at me about the Commonwealth's attorney: 1) it seemed that most witnesses would keep an eye on him while testifying looking for approval; 2) he was in a desperate bid for reelection and needed a death sentence in this case.

23) When the jury asked the question about life without parole, we had a legal discussion in chambers about what the answer would be without Mr. Bell.

24) I did not notice that the indictment, although referencing § 18.2-31, did not

mention §19.2-264.2 or any of the aggravators.

Signed this 12th day of March, 2003, under the pain and penalty of perjury.

/s/ Jud A. Fischel
Jud A. Fischel, Esq.

COMMONWEALTH OF VIRGINIA

COUNTY/~~CITY~~ OF Fauquier

SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, this

12th day of March, 2003.

/s/ [illegible]
Notary Public:
My Commission Expires: 12/31/2004

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL,	)	
Petitioner	)	
v.	)	Record No. _____
	)	(capital habeas
PAGE TRUE, WARDEN	)	proceeding)
Sussex State Prison,	)	
Respondent	)	

AFFIDAVIT

I, Mark Williams, being duly sworn, state the following upon my information and belief:

1) I was appointed to represent Edward N. Bell in his capital murder trail. Jud Fischel was lead counsel, and took primary responsibility for the guilt/innocence phase of the trial. I was primarily responsible for preparing for and presenting the defense case at the sentencing phase.
2) I tried to interview Eddie several times, but he was difficult to understand. I could understand his sister, and other members of his family much better than I could understand him.
3) Eddie was cooperative, not hostile.
4) At some point Eddie told me that an inmate named Greg had overheard Terry Lee Johnson stating that he (Terry) did not know anything about the case. Eddie gave me Greg's name and ~~the address of his family~~ [handwritten: telephone number MW] in Front Royal on a slip of paper, but I could not get in contact with him. Subsequently, I

could not find the information that Mr. Bell gave me.

5) I interviewed D.J. Shiflett at his house at least twice.

6) I received no information from Lloyd Snook or Marie Deans regarding their mitigation investigation. We did not hire another mitigation investigator.

7) After interviewing Mr. Bell, his sisters and his mother I concluded that there was little evidence that would assist in mitigating the case against Mr. Bell.

8) We asked for assistance from the Jamaican Embassy and Mr. Bell's family in requesting documents. I did not request any documents regarding Mr. Bell, such as education, medical or employment records, and I did not seek such information through interviews. This was because there were numerous other demands on my time, because of the difficulties in communication, and the complications resulting from the fact that Mr. Bell grew up in Jamaica.

9) After the Commonwealth rested, it requested permission to reopen the case because one of the Commonwealth's witnesses, Terry Lee Johnson, had not been sworn. We strongly objected, but the judge ruled that the Commonwealth could reopen its case for this purpose. This entire discussion happened in chambers, without Mr. Bell, and was not on record.

10) I reviewed the police reports regarding Mr. Bell's prior conviction for carrying a concealed weapon and I have no recollection

that the police ever claimed that Eddie reached for a gun.

11) LaNell Berger, an employee of the Commonwealth's Attorney's office, escorted more than one witness to the witness stand. I subsequently asked the Commonwealth's attorney to refrain from that kind of demonstration.

12) Many times before and during the trial we discussed legal issues in chambers with Judge Hupp and the Commonwealth; the court reporter and Mr. Bell were not present for those discussions.

13) After the trial, Alternate Juror Larry Miles contacted me through a third person. Juror Miles told me a) that two other jurors had known the Timbrook family and had attended church with them; and b) that the jurors had predeliberated.

14) Before the trial started I told Mr. Bell that he had a right to testify on his own behalf. I do not specifically recall telling him that he had a right to testify at the penalty phase of his trial.

15) When the jury asked the question about life without parole, we had a legal discussion in chambers about what the answer would be without Mr. Bell.

16) I did not notice that the indictment, although referencing § 18.2-31, did not mention §19.2-264.2 or any of the aggravators.

Signed this 12th day of March, 2003 under the pain and penalty of perjury.

/s/ Mark Williams
Mark Williams, Esq.

COMMONWEALTH OF VIRGINIA

COUNTY/~~CITY~~ OF Fauquier

SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, this 12th day of March, 2003.

/s/ [illegible]

Notary Public:

My Commission Expires: 1/31/07

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL,	)	
Petitioner	)	
v.	)	Record No. _____
	)	(capital habeas
PAGE TRUE, WARDEN	)	proceeding)
Sussex State Prison,	)	
Respondent	)	

AFFIDAVIT

I, Oswald Bell, being duly sworn, state the following upon my information and belief:

1) I am the father of Edward Bell.

2) I spoke (testified) at his trial.

3) I was not prepared to speak (testify).

4) I only met with Edward's attorney once, and that was in court.

5) I cannot read or write.

6) When we lived in Jamaica, almost all of Edward's work was with me as a laborer.

7) When we moved here Edward continued to work with me, some times part-time, some times full-time, until his arrest.

Signed this 13th day of March, 2003, under the pain and penalty of perjury.

/s/ Oswald Bell
Oswald Bell

COMMONWEALTH OF VIRGINIA

COUNTY/CITY of Winchester, SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, dated this 13th day of March, 2003.

/s/ [illegible]
Notary Public:
My Commission Expires:
5/31/03

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL, Petitioner	)	
	)	
v.	)	Record No. ___
	)	
PAGE TRUE, WARDEN,	)	
Sussex State Prison,	)	
Respondent	)	

AFFIDAVIT

I, Dorothy Downer, do depose and state the following upon my information and belief:

1) I am over 18-years old and competent.

[Handwritten:]

2) Eddie was a very good boy.
3) He was a hard working person, but he was only able to do simple jobs.
4) He was a friendly person.
5) Only problem he was a little slow in his brain.
6) He never was involved in Troubles.

[End handwritten material.]

I declare under penalty of perjury that the foregoing is true and correct, signed this 11th day of March, 2003.

/s/ Dorothy Downer
Name.

JAMAICA

PARISH/COUNTY/CITY OF [illegible]

SUBSCRIBED and SWORN before me in the jurisdiction aforesaid, this 11th day of March, 2003.

[illegible]

JP ~~OR Notary Public~~

[seal omitted]

IN THE
Supreme Court of Virginia

RECORD NO. 030539

EDWARD NATHANIEL BELL,
Petitioner,

v.

PAGE TRUE,
Warden, Sussex I State Prison,
Respondent.

CORRECTED PETITION FOR A WRIT OF HABEAS CORPUS

* * *

III. TRIAL COUNSEL FAILED TO INVESTIGATE, IDENTIFY OR PRESENT AVAILABLE MITIGATING EVIDENCE FOR THE PENALTY PHASE OF MR. BELL'S TRIAL

At the sentencing phase of Mr. Bell's trial, the defense case consisted of two witnesses – Mr. Bell's father and sister – who testified for a total of seven pages. There was nothing more presented on behalf of a man who was on trial for his life.

The importance of sufficiently investigating and presenting mitigating evidence in a capital case cannot be overstated. Only through a process that requires the sentencer to "consider, in fixing the ultimate punishment of death[,] the possibility of

compassionate or mitigating factors stemming from the diverse frailties of humankind, ... can capital defendants be treated "as uniquely individual human beings." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that the Eighth and Fourteenth Amendments require that a sentencer "may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604. The Supreme Court further explained this principal recently, noting that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams v. Taylor, 529 U.S. 362, 398 (2000).

During the punishment phase of a death penalty case, a defense attorney must gather significant evidence about his client's background to "present [the client] to the jury as a human being," ensuring that the defense has fulfilled its unique role in the "adversary process that our system counts on to produce just results." Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir.) (quoting Strickland, 466 U.S. at 688)), cert. denied sub nom. Kubat v. Greer, 493 U.S. 874 (1989). Defense counsel must complete a thorough investigation of a client's background, childhood, and mental health history to ensure that the jury, which is to decide whether their client will live or die, has before it a full picture of all mitigating characteristics. See, e.g., Eddmonds v. Peters, 93 F.3d 1307, 1319 (7th Cir. 1996) ("Counsel must make a significant effort, based on reasonable

investigation and logical argument, to mitigate his client's punishment."); Hill v. Lockhart, 28 F.3d 832, 845 (8th Cir. 1994) ("Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake, we believe that it was the duty of [his] lawyers to collect as much information as possible about Mr. Hill for use at the penalty phase of his state court trial."); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1996) (quoting Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989));.

The failure to collect and present relevant mitigating evidence to the sentencing body constitutes the ineffective assistance of counsel. See, e.g., Hall v. Washington, 106 F.3d 742, 749 (7th Cir. 1996) (granting relief when counsel overlooked significant mitigating testimony concerning petitioner's background and character); Glenn v. Tate, 71 F.3d 1204, 1208 (6th Cir. 1996) (finding deficient performance and prejudice where jury not presented with extensive mitigating evidence of defendant's neurological problems); Loyd v. Whitley, 977 F.2d 149, 159 (5th Cir.) (finding prejudice and granting punishment phase relief on basis that defense inexcusably overlooked evidence of defendant's mental illness).

The testimony of Mr. Bell's sister was minimal, and focused on her own difficulties. JA 2401-2403. Mr. Bell's father testified that he (the father) was an immigrant, hard working and his only trouble with the law was for speeding. JA 2404-2405. When asked how he felt about "this whole tragedy," the Commonwealth objected to the vagueness of the question; when the Court asked defense counsel to approach the bench and proffer what Mr. Bell was

going to say, counsel replied "[n]ot sure what he will say." JA 2406. The witness stated that "they don't have the right person," JA 2407, the Commonwealth's objected and the defense rested.

Defense counsel's closing argument was brief and included the following: "[t]he testimony that was offered was very graphic about a violent man. We didn't rebut it. Not try to defend it, refute it. We didn't." JA 2421. "The first thing I do when I get back to my home, or my office [after visiting his clients in jail] is I wash my hands." JA 2423. Counsel closed by stating that "Again, in a few minutes you are going to do something that is going to be the hardest thing you have ever done in your life. Ladies and Gentlemen, the Judge has done his job. Mr. Thomson and Mr. Abrams, and Mr. Fischel and I have done our job. Now, it is time for you to do yours." JA 2426.

At no point in his argument did defense counsel discuss Mr. Bell, his life or background, or his redeeming qualities as a human being. At no point did defense counsel ask the jury for a life sentence, or suggest that Mr. Bell was deserving of a sentence less than death. At no point did defense counsel remind the jury that a life sentence was life without parole,[12] or that the circumstances of the shooting were not cold-blooded, but compulsive. As Mr.

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[12] When the judge instructed the jury on the verdict forms, he continuously used the words "life in prison," and never used a term such as "without parole." Tr. 2430-31. During deliberations, the jury asked the court what the effects of a life sentence would be. JA 2951. In a conference in chambers and without Bell, App. Exs. 19 & 20, the court refused trial counsel's proffer of additional instruction and referred the jury back to their original instructions. JA 2998-99, 2951-53.

Williams himself stated, he did not understand the difference between a murder case and a capital case. JA 2928 ("a capital case is nothing but a murder case"). One of the jurors sitting on Mr. Bell's case summarized her reaction to this presentation as follows: "We were looking for something mitigating, some reason not to sentence him to death, but we were given nothing by his lawyers and we felt his lawyers did him a disservice." App. Ex. 7 (Affidavit of Connie Greer).

a. Ample Evidence Existed Regarding Mr. Bell's Background and Character

In fact, there were numerous reasons why the jury might have found Mr. Bell was deserving of a sentence less than death. Undersigned counsel, working under severe time constraints, have nonetheless talked to some witnesses, including Mr. Bell, who gladly shared Mr. Bell's good qualities – and would have been happy to do so with trial counsel and the jury. Had counsel acted reasonably, he would have discovered and presented the following information:

Mr. Bell is the 10th of 12 surviving children of Roselyn Bell, and the second of five children born to Roselyn and Oswald Bell. Eddie's mother had ten other children by three other men at the time of Eddie's birth, and Eddie's father had several other children by two other women. They all grew up together in Drapers, Jamaica, a small town of approximately 200 people. Eddie's maternal grandmother owned a piece of land there, upon which several family members built houses. Religion and the church were the social and spiritual hub of family life, with various family members

representing that the family attended church (which was on the same piece of family property) seven days a week. The entire family sang at church, and would also gather to sing at concerts outside the church.

Throughout his childhood, Eddie's father traveled regularly to the United States to perform seasonal migrant labor. His mother was also largely unavailable, as she worked for and lived with another family, taking care of their children. One of Eddie's sisters – Nellie – took primary care of the children.

Before the age of ten, Eddie was regularly given alcohol and marijuana by relatives, mostly uncles, who liked to see him sing and dance while high. Eddie became a daily user of both alcohol and marijuana before he reached his tenth birthday. App. Ex. 29 ("Substance Abuse History" in presentence report). Eddie's lack of educational and employment achievement and his cognitive deficits are described in Claim II, supra. While in Jamaica, Mr. Bell met and married Barbara Williams, who moved in with him and his family.

In 1986 Mr. Bell's mother moved to the United States to work for the son of the family she had worked for in Jamaica. The family gradually followed, and Eddie emigrated in 1992, when he was 28, moving to Winchester, VA, to live with his mother and father. Eddie and Barbara's child, Kamille Bell, was born shortly after Eddie emigrated. Ms. Williams has no reservations about the quality of Eddie's parenting, or his affection for his daughter. Eddie was a very loving and caring father and has an excellent relationship with Kamille. App. Ex. 1. In the past, Eddie helped

financially support Kamille. Id. Other family members note that after Eddie emigrated, anyone returning to Jamaica was always expected to have room in their suitcases for Eddie to send back gifts for his wife and child. Mr. Bell's trial counsel never spoke with Ms. Williams, and never asked her to testify at his trial. She would have been happy to do so had she been asked. Id.

For his first year in the United States, most of Mr. Bell's work was with his father, doing tasks such as gardening, picking fruit, cleaning buildings and stone work. Bell subsequently found work with various employers until his arrest in 1999.

Mr. Bell became a father to four more children, all of whom he loved and cared for fervently.[13] Dawn Jones gave birth to his second daughter, Kydesha, prematurely, and Eddie sat by Kydesha's bedside for several days after she was born. App. Ex. 4 (affidavit of Dawn Jones). After he and Ms. Jones separated, he would care for Kydesha on the weekends, while Ms. Jones would care for her during the week; Eddie also supported Kydesha financially. While Ms. Jones was subpoenaed by the Commonwealth to testify at Eddie's trial regarding a time he was in possession of a gun, she was never contacted or interviewed by Mr. Bell's trial counsel. Id. Ms. Jones would have liked to testify for Mr.

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[13] While it may be surprising to some that Eddie had five children with three different mothers, this would be considered quite normal – even modest – in Jamaican culture. Eddie's mother had a total of 15 children by 4 different men – numbers that were also neither unusual nor surprising in Jamaica. This could have been readily explained to the jury at Mr. Bell's trial.

Bell, and would have done so had she been asked. Id.

For most of the six years preceding his arrest, Eddie lived with Tracy Nicholson, and they had three children together: Eddie (Jr.), Xavian, and Diontre. App. Ex. 2. Ms. Nicholson's sentiments are in accord with those of the mothers of his previous children:

> Eddie was a very involved and loving father. Eddie worked a full-time job almost the whole 6+ years we were together and I was a stay at home mom. Eddie financially supported the kids the whole time and gave the kids anything they needed. Sometimes he'd come home with five bags of diapers at a time, because he was concerned about providing and didn't know if he'd have sufficient money.

Id. Mr. Bell also sent money home to sick relatives in Jamaica, which was part of the reason he had had trouble saving the necessary money to get his license reinstated. App. Ex. 12 (notes from Mr. Bell's counsel for his driving offense indicating $300 sent to his grandmother). Mr. Bell's trial counsel only spoke with Ms. Nicholson about how to find witnesses. App. Ex. 2. Although she wanted and expected to testify at trial, she was never asked to do so. Id.

Joanne Nicholson, Tracy's mother, similarly states:

> I lived with my daughter and Eddie Bell continuously for more than two years. During that time I observed that Eddie was a very good father, he was loving and protective. He always

> made sure there were milk and pampers in the house. He was often up early in the morning before anyone else, to get bottles ready for the babies... Eddie was present for the birth of all his kids – I remember him crying at the birth of his first son. He changed about as much diapers as Tracie.

App. Ex. 3 (affidavit of Joanne Nicholson). Mr. Bell's trial counsel only spoke with Mrs. Nicholson about the other witnesses. They never asked her about Mr. Bell. Id. She also expected she was going to testify, and came to court during most of the trial, but was never called to testify on Eddie's behalf. Id.

b. Trial Counsel Failed to Present Readily Available Evidence to Impeach the Egregious and Inaccurate Testimony of Billie Jo Swartz

At the punishment phase of trial, Billie Jo Swartz testified to a particularly shocking event. See Statement of Facts, supra, p. 9. Before Judge Hupp imposed the death sentence in this case, he stated "I remember specifically the testimony from a former girl friend and the demeaning way in which you treated her." Tr. 2578. Moreover, it was the only evidence the Commonwealth was able to muster to allege that Mr. Bell had been violent in the past. Thus, it was particularly important to impeach the facts she alleged in her punishment phase testimony.

Defense counsel was easily able to impeach her testimony at the guilt phase. JA 2570, 2574-76. Had defense counsel bothered to talk to the other witnesses of the event to which Swartz referred in

her penalty phase testimony, they would have likewise easily impeached it.

Tracy Nicholson – a supposed victim of Mr. Bell's actions on the day in question – stated:

> Eddy was never violent with me or the kids. Billy Jo Swartz told a story at trial involving me and her. The incident was because I was trying to get at her for chasing Eddy. Eddy stopped me from getting at her but he was never violent with either of us and, although I climbed on the car to try to get at Billie Jo while the car was moving, he stopped the car to avoid hurting me. Eddie did not have a gun with him.

See App. Ex. 2.

Joanne Nicholson's story verified Tracy's account of events on the day in question:

> Billy Jo Swartz lied during her penalty phase testimony. Billie Jo's kin, who I was friends with, called Tracie one day to tell her that Billie Jo was after Eddie. I drove Tracie over there and we encountered Eddie and Billie Jo outside of the house. Tracie went after Billie Jo and Eddy pushed Tracie away, to break up the fight. Billie Jo jumped in Eddy's car to protect herself from Tracie. Because the girls were getting out of hand and because Tracie was pregnant I made Tracie come home with me.

App. Ex. 3.

Despite the fact that both Joanne and Tracy were willing to testify on Mr. Bell's behalf and were available at trial almost every day, trial counsel never discussed Billy Jo Swartz's testimony with them, and did not ask them to testify and thus

impeach Ms. Swartz's version of events. App. Exs. 2 & 3.

* * *

IN THE
SUPREME COURT OF VIRGINIA

Record No. 030539

EDWARD NATHANIEL BELL,
Petitioner,

v.

PAGE TRUE, WARDEN,
Sussex I State Prison
Respondent.

RESPONDENT'S MOTION TO DISMISS
PETITION FOR A WRIT OF HABEAS CORPUS

* * *

Claim III(a)

Bell claims that trial counsel were ineffective because they allegedly did not investigate certain facts about Bell's background to present to the jury during the sentencing phase.[11] This is the same argument that was rejected in Hedrick V. Warden.

[11] Bell also makes a complaint that counsel's closing argument was deficient because it did not ask for a life sentence or suggest why Bell was deserving of a life sentence. (Pet. at 17). Bell misreads the record. Counsel in fact expressly asked the jury to sentence Bell to life for four reasons: he would not be a danger inside a maximum security prison; life in prison would truly be punishment; residual doubt about his guilt; and Bell's death would not restore Sergeant Timbrook's life and would cause more wounds to another family—Bell's. (JA 2930-2935).

Bell alleges that counsel should have presented the following evidence: Bell was the 10th of 12 children; his mother had 10 other children by three other men; his father had children by two other women; the family in Jamaica were church-goers; his father was absent from home when he traveled to the United States to do migrant work; Bell used alcohol and marijuana as a child; Bell married in Jamaica and his wife had his child after he came to the United States; he was a caring father who sent gifts to Jamaica; Bell worked at various jobs in this country; Bell fathered four other children here by two other women; and Bell lived with the mother of three of his children for six years. Bell faults counsel for not calling as witnesses Dawn Jones and Tracy Nicholson, the mothers of his United States children and Joanne Nicholson, Tracy's mother.

At sentencing, the Commonwealth presented the testimony of, among others, Dawn Jones. Jones informed the jury that while she was living in West Virginia, Bell came to her house, got into an argument with a man named "Patrick" and pulled out a gun. (JA 2886). The Commonwealth also presented the testimony of Billy Jo Swartz who recounted a harrowing episode in which Bell physically and sexually assaulted her and, in the same episode, brutally physically assaulted Tracy Nicholson who was pregnant with Bell's child at the time of the assault. Swartz also informed the jury that she had seen Bell on several occasions bagging cocaine and marijuana for sale. (JA 2861-2868).

The defense presented Bell's sister and father as witnesses. His sister informed the jury that Bell was one of 14 children and that the family was from Jamaica. (JA 2910). His father testified that he

started coming to this country in 1966 to work on farms and that he was a construction worker in Jamaica. (JA 2913). Both family members testified that the family, including all the siblings, never had been in trouble with the law. (JA 2911, 2914).

Bell is not entitled to relief because he cannot demonstrate either prong of the Strickland standard. Without question, counsel cannot be faulted for not investigating and presenting to a sentencing jury evidence which would have shown that Bell came from a promiscuous family and then himself indulged in a lifestyle by which he fathered five children by three different women, *no matter how "good" a father he was to them all.* Bell says that this irresponsible lifestyle could have been "explained" to a jury (Pet. at 19 n.13), but the question is not whether some attorney might have decided to go with such a risky plan; rather, the question is whether it was reasonable *not* to follow such a course. Clearly it was: counsel is not ineffective for failing to present evidence that is a "two-edged sword," capable of aggravation as well as mitigation. Barnes v. Thompson, 58 F.3d 971, 980-81 (4th Cir.), cert. denied, 516 U.S. 972 (1995); Whitley v. Bair, 802 F.2d 1487, 1494-1496 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Likewise, while some attorneys may decide to risk presenting to the jury their client's history of substance abuse as an "abuse-excuse" defense, many would quite reasonably decide not to do so because evidence of voluntary drug and alcohol abuse is the type of evidence that *supports* a finding of future dangerousness. See Giarratano v. Procunier, 891 F.2d 483, 490 (4th Cir. 1989), cert. denied, 498 U.S. 881 (1990). Indeed, the sentencer "may not be

impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that, when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate." Burris v. Parke, 130 F.3d 782, 784-785 (7th Cir. 1997). See also Britz v. Cowan, 192 F.3d 1101, 1104 (7th Cir. 1999) ("People with his background of antisocial behavior are more likely to commit murders than other people, but this does not make them attractive candidates for lenity; rather, it underscores their dangerousness"), cert. denied, 529 U.S. 1006 (2000).

Bell's counsel's obvious strategy was to present to the jury information that Bell came from a law-abiding family who would be affected by his execution. In closing argument, counsel stated they put Bell's sister and father on the stand for the following reasons:

> to show you there are other people. Not just the Timbrook Family who have been affected by this, who have been hurt by this. To put Eddie Bell to death is going to cause more wounds in another family. It is not going to bring [Rick Timbrook] back. Never.

(JA 2934-2935). The jury knew Bell was one of many children in a large Jamaican family and that his father did migrant work in the United States. They knew it was a law-abiding family. Had counsel delved too deeply into areas such as Bell supporting his children or sending gifts back to Jamaica, they would have opened the defense up to deadly cross-examination by the Commonwealth on such matters as how Bell supported his family, i.e., drug-dealing. The Commonwealth easily could have portrayed Bell

as an irresponsible man who indiscriminately fathered illegitimate children and never even saw his only legitimate child. The prosecutor would have been given more ammunition to argue even more strongly that Bell was a person who had utter disregard for the rights and lives of others.

Counsel never could be faulted for not calling Dawn Jones and the Nicholsons as witnesses, given the unfavorable testimony Jones gave as *a Commonwealth's witness* and given the devastating story told by Swartz about Tracy Nicholson. Counsel's conduct must be judged from the time it occurred, not with hindsight. Strickland, 466 U.S. at 689. Regardless what the Nicholsons have said *now* denying Bell's mistreatment of Tracy, at the time of the trial, counsel would not have wanted to risk putting Tracy or her mother on the stand. In the presentence report, the probation officer made a note of the fact that Tracy denied Bell's assaultive behavior *despite police reports to the contrary*. (JA 485). Had she been put on the stand to deny the Swartz episode, or any others, the Commonwealth could have impeached her with evidence from those police reports. No competent counsel would have opted for such additional aggravating evidence.

Even assuming the first prong of Strickland could be established - and it cannot - Bell never could demonstrate a reasonable probability of a different result had counsel adopted his habeas lawyers' risky strategy. Bell simply cannot show actual prejudice flowing from his counsel's conduct.

Claim III(b)

Bell contends counsel were ineffective because they did not impeach Swartz's sentencing testimony by presenting the Nicholsons to testify as they have

in their habeas affidavits. For the reasons given above, counsel cannot be found ineffective. Even assuming the Nicholsons would have testified then as they have now, counsel surely were not ineffective because the women would have been discredited by the evidence of Tracys reports of abuse made to the police in the past. The Commonwealth also could have presented Berry's eyewitness account of the beating Bell gave to Tracy. (Respondent's Exhibit 1). There is no reasonable probability of a different result had counsel put the Nicholsons on the stand; there is at least a reasonable probability that their testimony would have added to the aggravating evidence before the jury regarding Bell's criminal behavior.

* * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 29th *day of* April, 2004.

Edward Nathaniel Bell — Petitioner,

against Record No. 030539

Warden of the Sussex I State Prison, — Respondent.

Upon a Petition for a Writ of Habeas Corpus

* * *

In claim (III)(a), petitioner alleges he was denied the effective assistance of counsel at trial because counsel failed to investigate, identify or present available mitigating evidence for the penalty phase of petitioner's trial. Petitioner contends that ample evidence existed regarding his background and character that might have led the jury to conclude that petitioner was deserving of a sentence less than death. Petitioner alleges counsel should have presented evidence that Bell was the tenth of twelve surviving children of Rosalyn Bell, that his mother had ten other children by three other men at the time of petitioner's birth, and that his father had several other children by two other women. Petitioner's father was allegedly absent from home for long periods of time when he traveled to the United States to do migrant work, and his mother was allegedly unavailable because she worked for and lived with another family. Additionally, petitioner alleges his relatives regularly gave him drugs and alcohol when he was a child, and he

became a daily user of both marijuana and alcohol before the age of ten. Lastly, petitioner contends that evidence should have been presented that petitioner moved to the United States in 1992, held a variety of employment positions, and was a devoted father, financially caring for all five of his children and for relatives in Jamaica.

The Court holds that claim (III)(a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record, including the affidavit of counsel, demonstrates that after interviewing petitioner, his sisters and his mother, counsel believed that there was little mitigation evidence available to assist petitioner. However, the transcript of the sentencing hearing establishes that counsel introduced evidence of petitioner's background and family life and such evidence was heard by the jury through petitioner's sister and father. Petitioner's sister testified that petitioner was one of fourteen children and that, except for one speeding incident in which she was involved after petitioner's arrest, no member of the family ever had legal problems. Petitioner's father testified that he started traveling to the United States in 1966 to do agricultural work and that, except for speeding violations; he also never had any legal troubles. While counsel did not introduce evidence of petitioner's drug and alcohol use, evidence that both petitioner's parents had multiple children with different partners, or evidence that petitioner supported five children borne of three different women, counsel is not ineffective for failing to present evidence that could be "cross-purpose evidence" capable of aggravation and mitigation. See Barnes v. Thompson, 58 F.3d 971, 980-981 (4th

Cir. 1995), cert. denied, 516 U.S. 972 (1995); Lovitt v. Warden, 266 Va. 216, 257, 585 S.E.2d 801, 825 (2003).

Petitioner fails to proffer additional information that counsel should have discovered or presented during the penalty phase of petitioner's trial that would have assisted in mitigating his offense of capital murder. For example, there is not sufficient evidence in the record from a psychologist or a psychiatrist to show that petitioner's background and family life had an effect upon his development. See Lovitt, 266 Va. at 257, 585 S.E.2d at 825. Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigation evidence, the result of the proceeding would have been different. In finding no prejudice, the Court has weighed the evidence in aggravation against the mitigation evidence presented at the penalty phase of the trial and on habeas. See Wiggins v. Smith, 539 U.S. 510, _____, 123 S. Ct. 2527, 2542 (2003); Lovitt, 266 Va. at 257, 585.S.E.2d at 825-26.

In claim (III)(b), petitioner alleges he was denied the effective assistance of counsel at trial because counsel "failed to present readily available evidence to impeach the egregious and inaccurate testimony of Billie Jo Swartz." Petitioner alleges that Ms. Swartz's testimony, concerning a confrontation between petitioner and his former and current girlfriends, was the only testimony put forth by the Commonwealth showing petitioner's past violence; as a result, it was important for counsel to impeach her testimony. Petitioner contends that affidavits of

Tracy and Joanne Nicholson, prepared after petitioner's trial, discredit Swartz's testimony. In those affidavits, the Nicholsons state, respectively, that "Eddy was never violent with me or the kids," and "Billy Jo Swartz lied during her penalty phase testimony."

The Court holds that claim (III)(b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Counsel is not ineffective for failing to present evidence that could be "cross-purpose evidence" capable of aggravation and mitigation. See Barnes, 58 F.3d at 980-981. The Commonwealth could have presented other evidence, including reports to the police from Tracy Nicholson regarding abuse by petitioner, which would have discredited the testimony of both proposed witnesses. Thus, petitioner has failed to demonstrate how counsel was ineffective for failing to present the proposed impeachment evidence, and he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

* * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 17th *day of* November, 2004.

Edward Nathaniel Bell — Petitioner,

against Record No. 030539

Warden of the Sussex I State Prison, — Respondent.

Upon a Petition for Hearing

On consideration of the petition of the petitioner to set aside the judgment rendered herein on the 29th day of April, 2004, and grant a rehearing thereof, the prayer of the said petition is denied.

Upon further consideration of the petitioner's claim that the Court failed to address his assertion of ineffective assistance of counsel asserted in claim V(d) of his petition for writ of habeas corpus, and a review of the record and the Court's order, the Court holds that it did, in fact, resolve the issues stated in claim V(d).

A Copy,

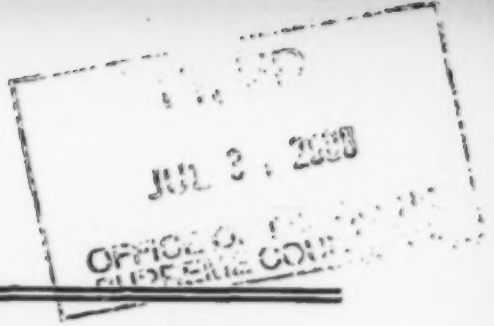
Testo: [illegible]

Clerk

110

(12)

FILED
JUL 3 , 2008
OFFICE OF THE CLERK
SUPREME COURT



No. 07-1223

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX – VOLUME II
(Pages 233 to 818)

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PETITION FOR CERTIORARI FILED MARCH 25, 2008
CERTIORARI GRANTED MAY 12, 2008

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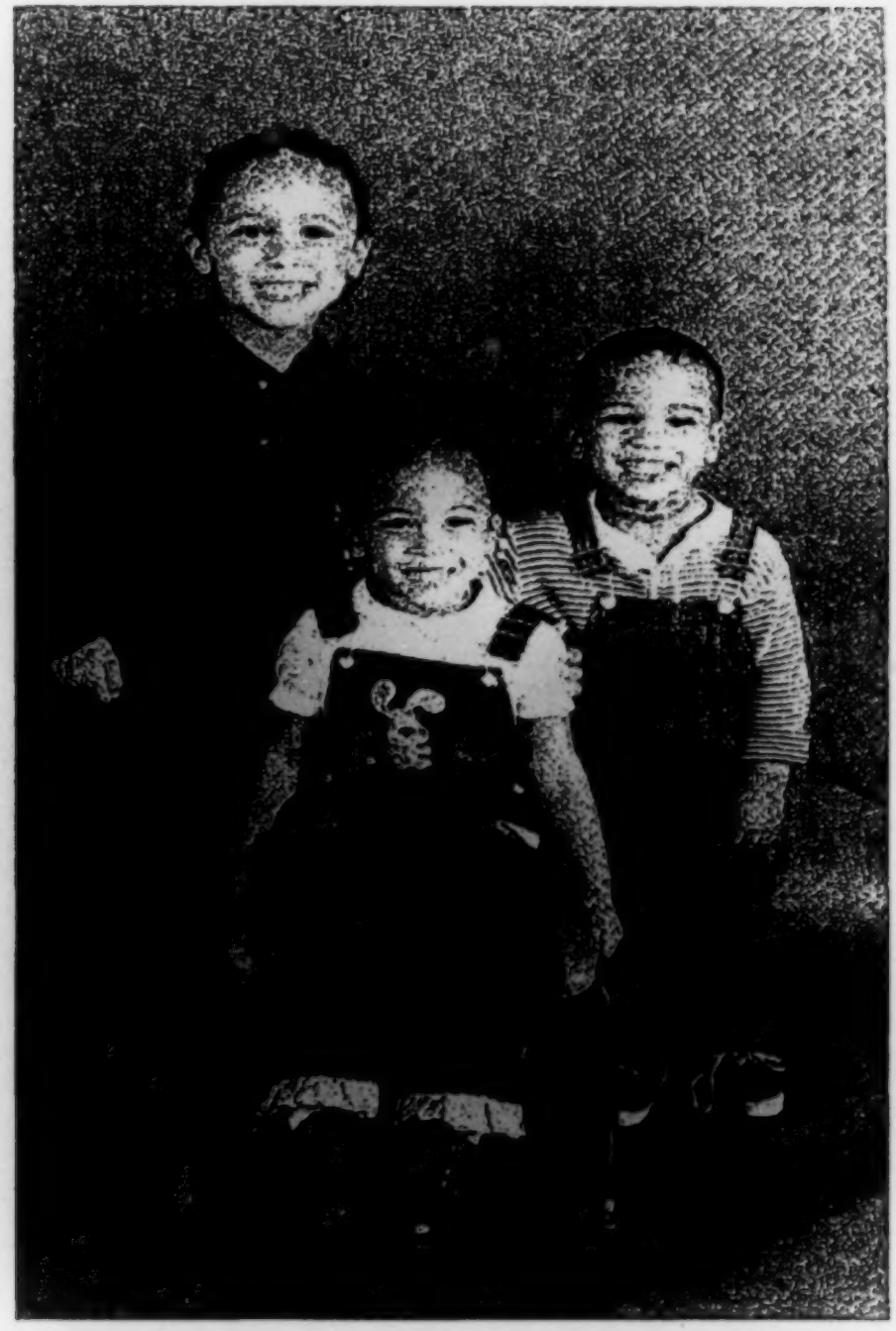


[§ 2254 PETITION EXHIBIT 2]

[§ 2254 PETITION EXHIBIT 3]

Feb 2000

For all the things
you do for me and for
all the fun times, too,
This Valentine is
filled with hugs
because, Dad,
I really love You!

Happy
Valentine's Day
Love
Alyse
EJ, Diontre
+ Kavian

[§ 2254 PETITION EXHIBIT 4]

June 2000

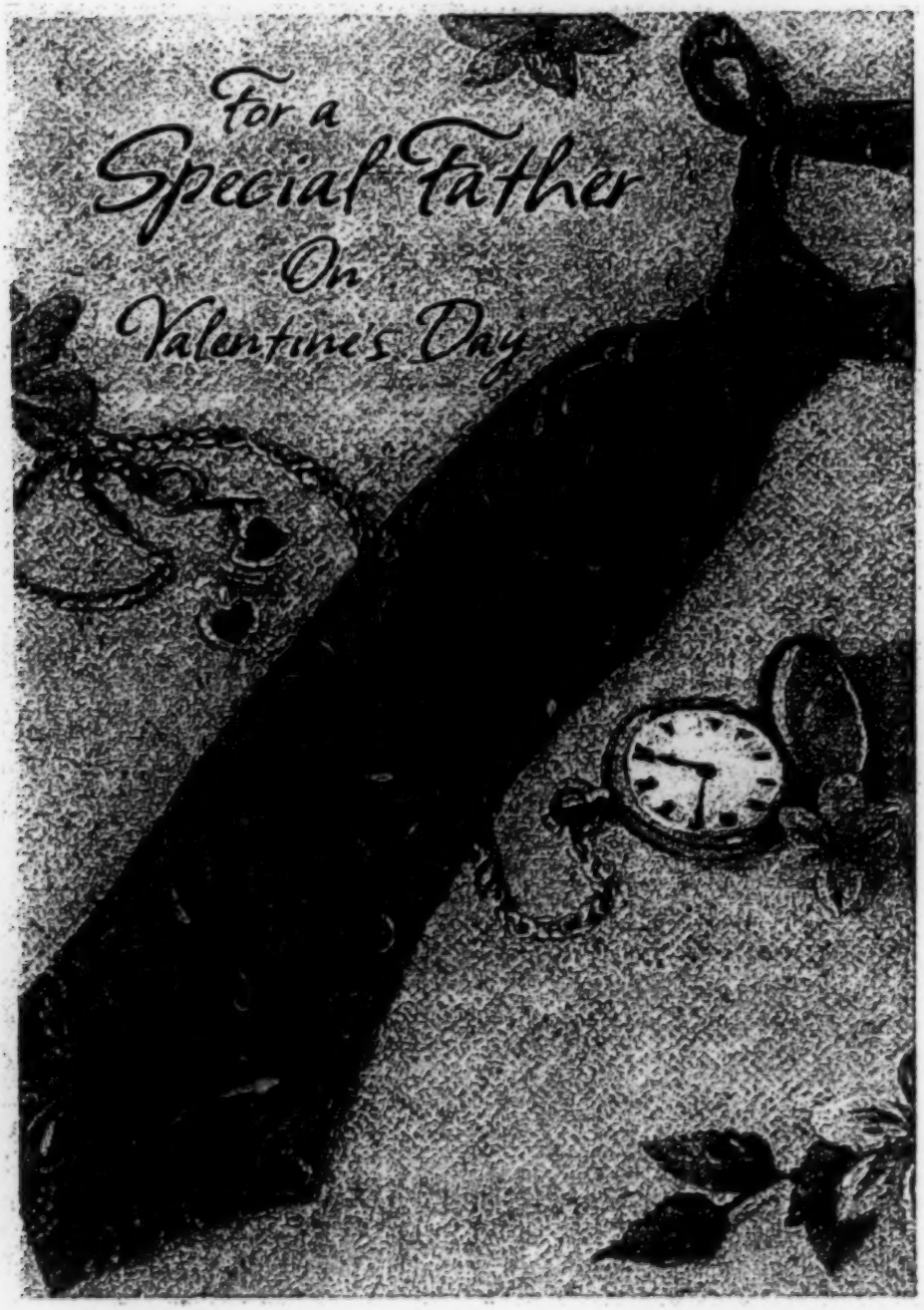
Even though
we can't be together
this day it will
still be special to us,
and someday we
will spend them
together with our
kids we miss +
love you so much.
No matter what we
went through you
always took care
of the kids your a
good Daddy. I ♡ u
Tracy

May good times
and great memories
be the special gifts
that fill your
Father's Day
with happiness.

Happy Father's Day

Love,
EJ, Xavier
Dionte & Alyse

[§ 2254 PETITION EXHIBIT 5]

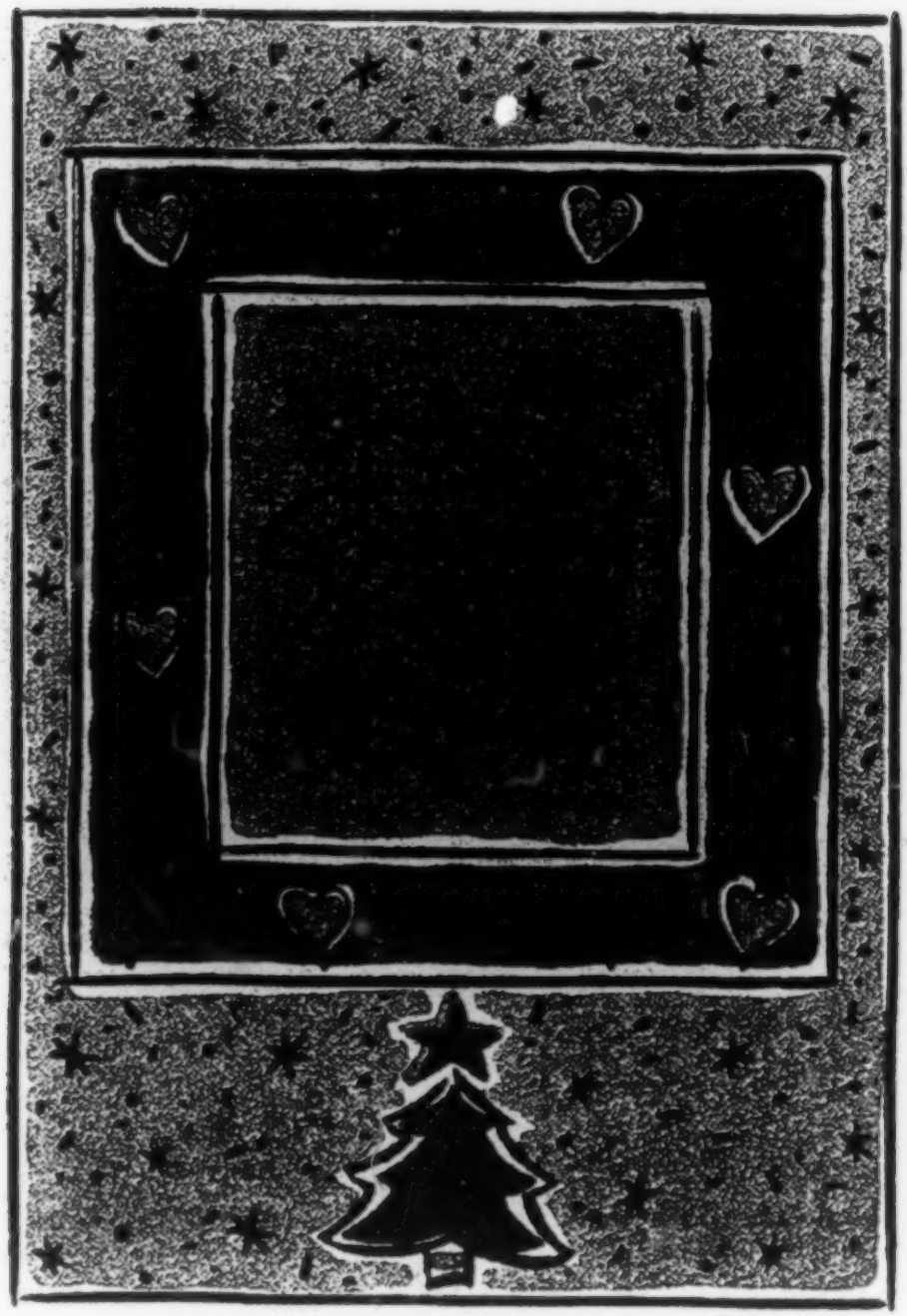


A Valentine to let you know
I think it's really nice
That you have always been there
when I've needed some advice...
On Valentine's to hope you'll find
your day turns out to be
One special as the feelings that
you've always been to me!

Happy Valentine's Day
I miss you and love you
Diane

2001

[§ 2254 PETITION EXHIBIT 6]



JA-242

Eddie. Dec 99

We miss you baby. Keep faith will all be together again.

Love you always
Tracy

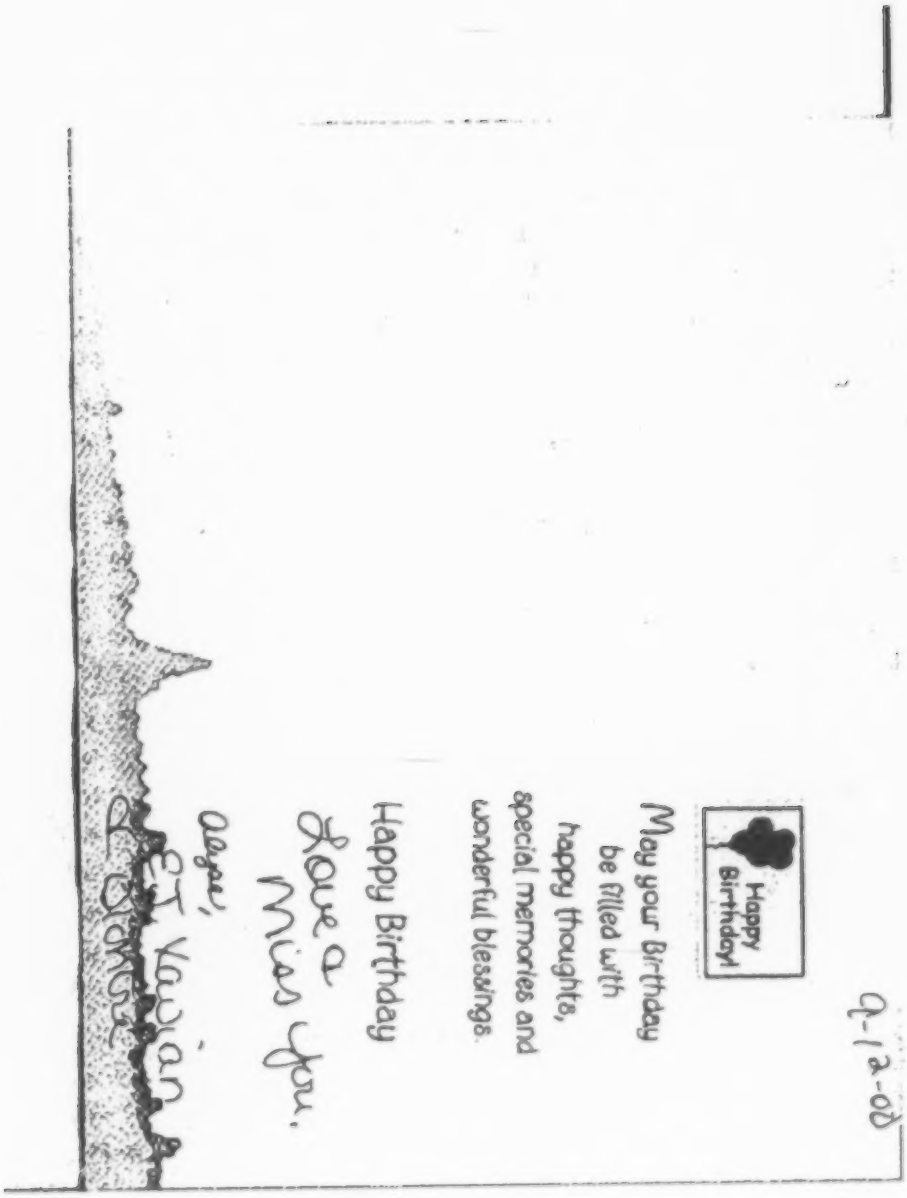
Dad, this special
Christmas wish
comes straight
from my heart
and it's filled
with wonderful
thoughts of you.

Merry Christmas

alyse
EJ Xavian
Diontre &
Kydesha

[§ 2254 PETITION EXHIBIT 7]

You're Special to Me


9-12-00
Happy Birthday!
May your Birthday
be filled with
happy thoughts,
special memories and
wonderful blessings.
Happy Birthday
Love a
Miss you.
Alyse,
E.T. Xavian
& Bishop

[§ 2254 PETITION EXHIBIT 8]

Feb. 2001

Happy Valentine's Day
to the best daddy
in the whole wide world!

Love You!
EJ Kaylan
& Diontre'

JA-246

[§ 2254 PETITION EXHIBIT 9]

JA-248

Eddie,
Love you!
We will be
together this time
next year.
See you Xmas
Eve + Xmas
Night

TRE'

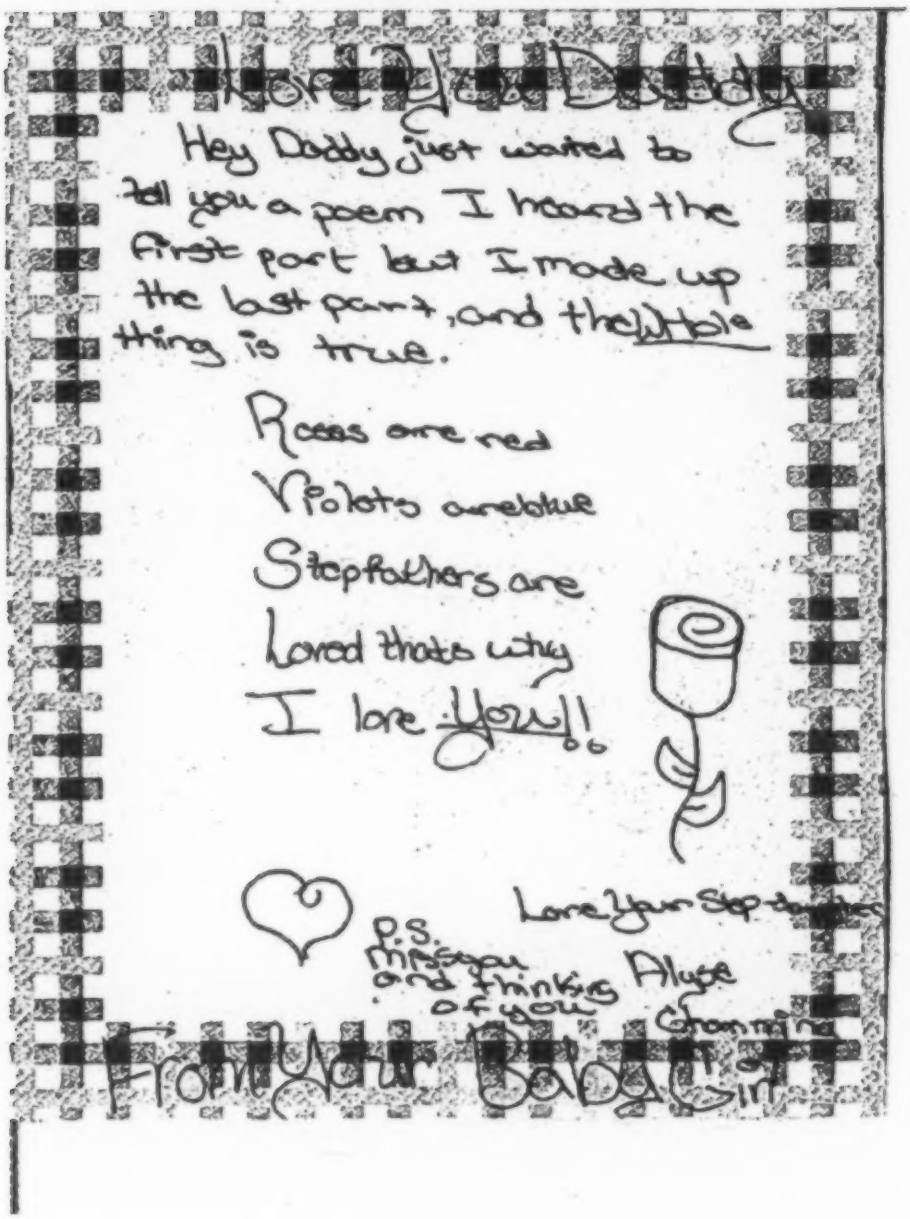
Dec 2000

Thinking of you, Dad,
with warm wishes for
a beautiful Christmas
and a wonderful year
of special memories.

Merry Christmas

Well Love
and miss you
EJ, Xavian
DiOSHRE + Alyse
I love you
Eddie

[§ 2254 PETITION EXHIBIT 10]



[Handwritten; capitalization standardized in transcription]

Occurrence 8/18/2000

To whom ever it may concern I Enos J Davenport [cursive] Enos J Davenport witnessed Officer Robinson screaming and yelling at the top of his lungs directly in Mr. Bells face whilc Mr. Bell was hand cuffed. The incident occurred almost directly in front of my cell no. 1x6, were I could clearly see it taking place. The officer was very loud, belligerent, and intimidating as if he were in a state of rage. I thaught he was going to physically attact Mr. Bell, and all this occured because Mr. Bell simply ask for a shower curtain, which I myself had ask for a shower curtain. The plumbing was stopped up the night before and as the area was being cleaned, the raw sewage was being dumped into the shower area. So some of the inmates verbally requested a new shower curtain and a rubber mat, so that we could take showers. Well about 15 min after Robinson's yelling at Mr. Bell then he brings a new shower curtain and said they would clean the mat with bleach. Late that day Officer Robinson brought in the mail. He was giving mail to Mr Bell, Mr Bell ask if he was reading his mail the officer replied Yes I took up speed reading and I'm reading your mail. Then Mr. Robinson took the envelope. Mr Bell ask for the envelope. The officer said no because it had rope in it, then Mr Bell asked for a copy of the envelope so he could retain the address which he never got the copy. The handbook clearly states that an officer is to treat you with dignity and respect I

never saw that in this incident. Had I been in Mr. Bell's shoes I don't know if I could have held my composure. I never heard or saw Mr. Bell disrespect this officer in any way

signed Enos J Davenport
8/18/00 /s/ Enos J Davenport

[Handwritten document]

Billie Jo Swartz.
Over 21
1124 Purcell Lane
Winchester, VA 22601.
540-667-4126 (Grandma)

I gave evidence at the trial of Eddie Bell. I didn't want to give evidence. The assault and battery case happened in 1998 and the murder of Timbrook was in 1998. At the time of the Timbrook murder I was locked up in Harrisonburg where I was serving a sentence. I was locked up in 1998 and I started to do my sentence. A cop from Winchester came down to see me in jail. His name was Lennie Milholland. He asked me some questions about the assault and I told him the truth. I also told the truth at court.

When I went to court at Winchester to give evidence I saw the prosecutor Paul Thompson. He said he wanted help in the case. I told him I wanted to drop the charges. Me and Eddy was still together. I found out on the news that Eddy had been charged with the murder. Thompson said I had to go to court. The Commonwealth had picked it up. I don't know why they hadn't brought the case before Timbrook was murdered. The only time they took any interest was after the Timbrook murder.

I was locked up in Harrisonburg because I had a probation violation. Milholland came about 1 week after the murder of Timbrook. The gun that was used to assault me was not the gun to kill Timbrook.

I know the gun he had was a pure black gun. It not have a white pearl handle.

I had to do my violation time and I was doing my time at the time I gave evidence. I told the truth at court.

At the time I gave evidence I was put in the work release program and given privileges you don't normally get in jail such as access to the washer and dryer. I wasn't actually on work release. I was in the drug pod. The judge put me in there for 90 days. It was Judge on the 3rd floor – Judge Wetsel who gave me the time. It was the same judge that did Eddie Bell's trial.

Paul Thompson asked me if I thought he killed Timbrook and I told him that I didn't. They asked if he was drug dealer and I said that he wasn't and if he was a crack dealer I wouldn't be on the street hustling for it. Eddie didn't smoke. He was violent to me but I never thought of him as a killer. I don't know what my case had to do with the murder. I don't know nothing about the murder.

When he hit me with the gun I was not in fear of being killed. I knew he wouldn't kill me. I was never interviewed by Eddie's lawyer or any investigator until today. I would have said the same to anyone who asked.

Mr. Crane is the public defender. He worked for the courts. He's known as plea bargain Crane. He has been my lawyer throughout. He did deals for me

with the Commonwealth. I hereby give you and your lawyer James Connell permission to have full access to my files.

After I gave evidence I had some very good deals. They put me in treatment center even though I hadn't completed the previous three. Every time I went in front of the judge Paul Thompson was the prosecutor and he arranged the deals. The public defender spoke with the Commonwealth and Paul Thompson agreed to the deal.

/s/ Billie Jo Swartz 5/12/05

Taken by me and signed in my presence

[illegible] Notary Public
My commission expires 31st Oct 2005

IN THE DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

EDWARD N. BELL,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Case No. 7:04CV00752
	:	
WILLIAM PAGE TRUE, Warden,	:	
	:	
Respondent.	:	

AFFIDAVIT

I, Rosa Starks-Cadet (DOB: 8/12/62), do depose and state the following upon my information and belief:

1. I am familiar with Edward N. Bell and the crime for which he was convicted.
2. I have never known Bell to be a violent person, to make threats, or to get involved in fights.
3. On one occasion, I was serving time in jail when Commonwealth's Attorney Paul Thomson contacted me in the jail. Thomson asked for my help in an investigation. He told me that if I would cooperate, he would have me released from jail the following day. I agreed to cooperate, and I was released from jail the following day.
4. Detective Milholland coordinated the investigation I was involved in. He asked me to question Aretta Terry about the gun used to

shoot Sergeant Timbrook and the purple car. Milholland asked me to introduce two other people, a black man and a [handwritten insertion initialed RS: white] woman, to Terry, which I did. I claimed that the black man was my cousin. Milholland sent me a check for $100 for my participation.

5. On another occasion, Allen Sibert, whom I believe to be a DEA agent assigned to the Warren County Sheriff's Office, gave me a tape recorder for my pocket and a microphone for my chest. He took me to meet Terry so that I could tape record our conversation, which I did.
6. As a result of my cooperation in the investigation of Bell and Terry, I received a reduction in my sentence.
7. I know Billie Jo Swartz and her reputation in the community. I know that she has been addicted to crack cocaine as long as I have known her. Swartz has a reputation in the community as a "crackhead" and a liar.

I declare under penalty of perjury that the foregoing is true and correct, signed this 12 day of May, 2005.

/s/ Rosa Starks-Cadet
Rosa Starks-Cadet

Sworn before me on 12th May 2005, at Fluvannah Correctional Center, Troy, Virginia

[illegible]
Notary Public
My commission expires 10/31/2005

Institute of Law, Psychiatry & Public Policy
University of Virginia

P.O. Box 800660 Blue Ridge Hospital
Charlottesville, Virginia 22908-0660

January 7, 2001

Mark B. Williams, Esquire
Attorney-at-Law
7 Wall Street [H/written: 703-771-2517]
Warrenton, VA 20186

Mr. Jud A. Fischel, Esquire
Attorney-at-Law
24 Ashby Street
Warrenton, VA 20186

Re: Commonwealth of Virginia v.
Edward Nathaniel Bell
Docket No. CR99-478 & 479 and
CR00-2 & 3

Dear Mr. Williams and Mr. Fischel:

Pursuant to my appointment by the Honorable Dennis Lee Hupp under Section 19.2-264.3:1 of the Code of Virginia, I have completed a forensic psychological evaluation of the above-named defendant, currently charged with Capital Murder. Under Section 19.2-264.3:1, a report shall be prepared that addresses the personal history and character of the defendant, as well as his mental

condition at the time of the offense. The Code also requires that the report shall address 1) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense, 2) whether the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired, and 3) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense. This report constitutes partial fulfillment of this examiner's appointment under this section.

This report is based on a broad range of information and evaluation procedures. This is a standard practice in capital sentencing evaluations, since the Code of Virginia requires the evaluator to develop a comprehensive understanding of the individual's character and mental condition. This evaluation if based on the following sources:

Interviews: Forensic interviews with Mr. Bell were conducted on 10/12/00, 11/11/00, 12/6/00 at the Clarke-Frederick-Winchester Regional Adult Detention Center, eight hours total.

Psychological Tests Administered: Rey 15-Item Test, Raven's Standard Progressive Matrices, Bender Gestalt Test, Clock Drawing Test, Trail-making Test Parts A and B.

Collateral Interviews:

1. Ms. Marjorie Bell and Ms. Diane Howard on 10/12/00.
2. Ms. Tracy Nicholson on 11/1/00.

3. Ms. Norlene Bell on 11/1/00.
4. P.J. Krieger, Captain of Security, Clarke-Frederick-Winchester Regional Adult Detention Center on 11/1/00.
5. Willow-May "Nellie" Hutchinson Walker (now deceased) on 11/16/00, 11/30/00.
6. Ms. Marjorie Bell on 11/30/00, 12/14/00.

Records Reviewed:

1. Records from the Immigration and Naturalization Service.
2. Records from the Clarke-Frederick-Winchester Regional Adult Detention Center.
3. Transcript of preliminary hearing dated 12/20/99.
4. Statement of Edward Nathaniel Bell taken by Investigator L.W. Millholland and Investigator J.G. Printz of the Winchester Police Department, dated 10/30/99.
5. Report by Lieutenant David White, dated 11/4/99.
6. Supplemental Report to Winchester Police Department Incident Report, signed by Officer D. M. Ellinger.
7. Statement of Officer Robert Lee Bower, Winchester Police Department, taken 10/20/99.
8. Statement of Officer R. Matt Holben, Winchester Police Department, taken 10/30/99.
9. Statement of Brad Triplet, Probation and Parole Officer taken 10/30/99.
10. Statement of Daniel Charles Spitler taken 10/30/99.

11. Untitled, updated police investigator narratives.

Note: Jamaican school, medical, military and criminal records were pursued through the offices of the Ambassador of Jamaica in Washington, DC. Prior to the preparation of this report, the Embassy of Jamaica indicated that their staff had no success in retrieving any Jamaican institutional records. Family members in Jamaica were also unsuccessful in obtaining any of this information.

Identifying Information

Mr. Bell is a 36-year Jamaican married male, who is charged with Capital Murder in the death of a police officer. He has been incarcerated in the Clarke-Frederick-Winchester Regional Adult Detention Center (ADC) since October 30, 1999, the day after the offense. Prior to his arrest, Mr. Bell was unemployed. He had been living in the greater Winchester, Virginia area, dividing his time between his parents' home and the home of his two girlfriends.

Mr. Bell, born and raised in Portland Parish, Jamaica, is the 11th of 13 surviving children. He immigrated to the United States in 1992. Mr. Bell is married to Barbara Bell. She resides in Jamaica with the couple's 9 year-old daughter. Mr. Bell has four other children by two women in the Winchester, Virginia area.

Circumstances Surrounding the Alleged Offenses

Defendant's Version: The defendant's statements about the alleged offenses are protected against disclosure until such disclosure is compelled, or until the defendant waives his privilege.

Commonwealth's Version: Mr. Bell is charged in the shooting death of a City of Winchester Police officer, Sergeant Ricky L. Timbrook. According to information presented at the preliminary hearing, Mr. Bell allegedly shot the officer on the night of October 30, 1999 in a dark alleyway. The shooting occurred while Sgt. Timbrook was pursing a suspect, allegedly Mr. Bell on foot. As the officer rounded a corner in the alleyway, he was shot once in the face. A search of the area ensued. Mr. Bell was discovered the next morning hiding in a basement near the crime scene. In his statement to the police, Mr. Bell admitted to running through the alleyway that night, but he denied involvement in the shooting. A handgun matching the caliber of the lethal bullet was later found outside under a porch. There apparently is no physical or trace evidence to link Mr. Bell to the presumptive murder weapon.

Current Mental Status (October – December, 2000)

Mr. Bell was interviewed on three occasions in a private setting (the law library) at the ADC. This provided multiple opportunities to evaluate his mental status and behavior in a secure setting. Mr. Bell's mental status and demeanor were consistent across each of the three interviews.

Mr. Bell's speech was clear, coherent, and goal-directed. Pace, volume and production were within normal limits, and there was no evidence of perseveration, paraphasias, articulation difficulties, or dysfluency. His speech was heavily accented, and spoke with a heavy Jamaican *patois*. He followed both simple and complex commands, and showed no evidence of receptive language difficulties.

Mood and affect were variable. During portions of each interview, Mr. Bell appeared sullen and discontented. At these times he expressed an attitude of hopelessness and irritation about his situation and about his life in general. At various points he expressed angry emotions. Some of these expressions were appropriate, in that he was expressing understandable negative emotions about his own past behavior or the poor behavior of others. At other times, he became mildly confrontational and obstructionistic with the examiner. He never expressed excessive anger towards the examiner, however, and was able to regain his composure with little difficulty.

There were no signs or symptoms of a severe mental illness. In other words, there was not evidence of hallucinations, delusional beliefs, severely agitated behavior, or confusion. Mr. Bell did express a variety of ideas that can be described as suspicious or mildly paranoid; he appears to view most people around him as potential sources of harm. He also believes the jail staff and administration are "depriving (him) of his rights." This is not particularly unusual or surprising considering his current legal situation. At some juctures, he

appeared wary and cautious with the examiner. Suicidal ideation was denied.

Attention and concentration were variable. During periods of pronounced irritability or low mood, Mr. Bell was distractible and self-absorbed. At other times, he was able to focus and concentrate without apparent difficulty. Memory functions appeared intact. He had no difficulty with short- and long-term recall during the clinical interviews; he was able to recall detailed information about events that had occurred at various points in the past, including addresses, names of employers, etc. At times he had difficulty reconstructing events in terms of specific dates. This did not appear to be due to memory problems *per se*, but to the complexity of events that occurred at various point throughout his childhood and young adulthood.

For the most part Mr. Bell's manner of relating was part open and relaxed. He responded to questions in a manner that appeared forthright. Except during the administration of psychological tests (see below), there were no excessive response latencies, and eye contact was neither avoided nor excessive. At times he appeared angry, annoyed, and mildly agitated, particularly when pressed about sensitive aspects of his personal history.

Test Results and Interpretation

Because there is a reported history of a mild closed head injury, a number of brief neuropsychological instruments were administered to screen for the presence of possible brain damage. Prior to administering these tests, and because these tests are susceptible to the effects of sub-optimal effort or

motivation (that is, malingering or faking), the Rey 15-Item test was administered. This is a simple memorization test, wherein the subject is presented with a sheet containing 15 alphanumeric and geometric symbols. They are told to study the sheet for 10 seconds, and then to reproduce it from memory after the sheet is removed. The task is deceptively simple; even seriously impaired individuals perform at about the 80% accuracy level when they give their best effort. Individuals who are motivated to simulate of fake cognitive and memory impairments will often perform at a significantly lower level of accuracy. Mr. Bell's performance on this test was significantly worse than expected (7 of 15 items recalled). This level of performance in the range thought to be consistent with an effort to simulate or feign cognitive impairment. Because of this, the results of other testing are interpreted cautiously.

Mr. Bell completed two neuropsychological tests of visuomotor ability. The Bender Gestalt Test requires the subject to copy simple geometric designs from several stimulus cards presented one at a time. This is followed by asking the subject to draw the designs from memory. These procedures provide an opportunity to evaluate the subject's visual-motor abilities, visual organization, and short-term visual memory. Mr. Bell performed marginally on this task. He recalled only 4 of the 9 figures, somewhat below the average number of figures that most neurologically intact people would obtain. The Clock Drawing Test requires the subject to draw a clock set to a specific time. They do this without use of a model. This procedure provides an opportunity to

evaluate spatial visualization abilities, as well as motor planning and organization. Mr. Bell's efforts on this test were somewhat atypical; he produced an adequate form for the clock, and placed the numbers accurately, but could not position the hands to any of the required times. He commented that he did not know how to tell time, and the he "did not know which hand was the big hand." Mr. Bell worked very slowly on each of these tasks, much more so than one typically encounters in the cases of neurologically impaired individuals.

The Trail Making Test is a paper-and-pencil sequencing task that consists of two separate trials. Part A involves connecting a series of number circles in proper succession. The circles are arranged in a random array on a single page. Part B also involves connecting circles on a page in correct sequence, but the progression alternates between numbered and lettered circles. Part B is much more difficult, since the subject must divide their attention between two symbolic arrays. Both Parts A and B are timed, and both tasks involve fine motor abilities, visual scanning abilities, as well as the ability to maintain cognitive set. The Trail Making Test is very sensitive to the effects of even mild brain damage. Mr. Bell performed so slowly on this task, especially on Part B, that his score falls below the lowest possible entries in the normative table. This level of performance in an otherwise healthy individual is difficult to account for, other than to infer sub-optimal effort by Mr. Bell.

To obtain an estimate of Mr. Bell's general intellectual capacity, the Raven's Standard Progressive Matrices were administered. This

culture-fair, nonverbal problem-solving test is considered the preeminent measure of general intelligence for use with culturally diverse groups. Mr. Bell's performance was again quite atypical; he worked extremely slowly, and made an inordinate number of errors for his level of educational and occupational achievement. His level of performance was far below the 1st percentile, in a range of scores consistent with severe mental retardation. This score cannot be viewed as an accurate representation of Mr. Bell's true capacities. He appears to have approached the test with insufficient motivation to give his best effort.

OPINIONS:

1. Whether the defendant acted under extreme mental or emotional disturbance at the time of the alleged offense.

In his statement to detectives on the night of his arrest, Mr. Bell reported he was speaking with a man in a parking lot when a car came up quickly and parked facing them with the headlights on. Three men jumped out of the car and came toward them. Mr. Bell reported he became scared and thus ran from the approaching men. In another statement to this evaluator, Mr. Bell stated that he had been walking home after a night of gambling, and suddenly found he was being pursed by "a black dude". He ran through the streets to elude this man, whom he feared "wanted to jump (him)". Mr. Bell climbed into a basement window to hide from this man, and heard a single gunshot once he was in the basement. He remained in the basement, fearing for his life.

According to Mr. Bell, he was intoxicated on marijuana approximately one hour preceding the alleged offense and was still feeling the effects of this intoxication. He reports that this intoxication was voluntary, and there is no evidence of severe adverse reactions to his intoxication such as substance-induced hallucinosis, delusions, etc.

Although these factors contributed to a mildly toxic and emotionally agitated psychological state on the night of the alleged offense, they do not rise to the level of extreme mental or emotional disturbance, such as a paranoid or psychotic mental state.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were significantly impaired.

Although he was experiencing the expectable effects of recent voluntary marijuana intoxication, there is no evidence to suggest that Mr. Bell is unable to appreciate the criminality of his conduct or was unable to conform his conduct to the requirements of the law.

3. Whether there are other factors in mitigation arising from his history, character, or mental condition at the time of the offense.

Mr. Bell's personal history is complex, with early and persistent drug use; however, it is not notable for any known traumas, neglect, or abuse. To the extent the presentation of biographical information may be useful in assisting the trier of fact to form a more complete picture of the defendant, the following information is offered.

Family History

Mr. Bell is the 10th child of 13 born to Ms. Roselyn Bell in Drapers, Jamaica. His siblings are as follows:

Of Father Winston Hutchinson (lives in England),

Willow-May "Nellie" (prior to her sudden death in 12/00, she lived in Jamaica, and was approximately 50 years old)

Millie "Dolly" (lives in England)

Of Father Perry Kettle (deceased)

Ronesta "Rona", (lives in Chicago)

Loretta "Clover," (lives in Canada)

Croslyn "Cros,", (brother, lives in Chicago)

Marcia (lives in Jamaica)

Linton (residence is Jamaica but lives and works mostly on cruise ship)

Of Father Wellington Aflick

Wilbur "Sonny,"(lives in Winchester)

Of Father Oswald Bell

Norlene (lives in Winchester)

Eddie (lives in Winchester, 36 years old)

Donna (lives in Winchester)

Diane (lives in Winchester, 32 years old)

Marjorie ((lives in Winchester, 31 years old)

Jamaica, pre-1992: According to Mr. Bell's oldest sister Nellie, the family originally lived in a small Jamaican town (population approximately two hundred), which is located near a tourist area. The maternal grandmother owned land and several

family members built houses on this land. Initially the family lived in a small, single-family residence but eventually Mr. Bell's father built a larger house on this land. Nellie reported that the land has since been subdivided and sections of the land have been sold; however, there are two aunts who continue to live on this parcel of family land.

Sisters Marjorie, Diane, Norlene and Nellie characterized their childhoods and early adult life in Jamaica as reasonably cohesive, ground and generally happy. Education and religion were stressed. Nellie indicated that the community church was built on their family land and was a social hub of the community. It was also an extremely important part of their early lives. Marjorie reported they attended church as often as they could. The entire family sang at church and at home. Mr. Bell sang bass, Marjorie *alto* and Norlene *soprano* and as they grew older, He, Marjorie and Norlene would perform concerts for extra money.

Nellie stated that their mother's policy was that children had to go to school every day. She tried very hard to ensure all her children were educated. The older siblings were very involved in raising the younger siblings. The oldest sister, Nellie, reportedly served as a second mother to many of the children. All sisters interviewed are very protective and respectful of their parents and speak very highly of them. They describe the parents as very involved in parenting during the defendant's formative years. Norlene stated that they would "get whippings" if they did something wrong and the kids expected this form of discipline and did not consider it child abuse. Mom was characterized as having a "soft spot";

Father "held the line a little more". Mr. Bell's sisters Marjorie and Diane characterize Mr. Bell as a "Mama's boy". He was always very involved with her even when he lived elsewhere. They state that he has always gotten everything he wanted. He was the only biological son of his father and he was always allowed to go out anywhere, while the girls were not allowed to. Diane believes the defendant had it "too easy". Their father would go out on a limb for him and less so for the girls. Mr. Bell feels quite differently, insisting that the girls were favored, and that he was often punished unfairly for wrongs he did not commit.

Marjorie and Diane indicated Mr. Bell started school at 3 or 4 years old in what is known as a "Basic School". He stayed there until approximately age 6, and then started the "All Age" school. He attended the All Age School until approximately age 15 years, at which time he graduated. (School records were unavailable for review.) Marjorie reported that the defendant helped with his younger siblings. For example, he taught her to read and count, and would take her everywhere with him. Mr. Bell was recognized as very artistic and his schools displayed many of his drawings in the greater community. All sisters reported that He was popular and had many friends in Jamaica. He was a "DJ", singer and rapper. His dream was to be a rapper in the United States.

Throughout the defendant's childhood, his father regularly traveled to the United States to perform seasonal migrant farm labor. With his father working in the United States many months each year, Mr. Bell was without a father much of the year.

Because the father sent money home, the family was able to have material goods unavailable to others in their social class (e.g., tennis shoes, etc.), and they were able to share these goods with family and friends. Father would also bring home apples and sugar from his work on the farms to give to the neighbors. Norlene indicated that her father "busted his ass" to provide for the family and make them comfortable. Upon returning home to Jamaica, the father continued to work construction and maintained a small farm with cows.

When the defendant's mother was a young girl, a family in the neighborhood needed help taking care for their children. Although she maintained strong ties to her own family, his mother went to live with this neighborhood family. Once the children were raised, mother maintained contact with the family, even after they moved to the United States. Sister Nellie indicated that in 1986, their mother was asked to come to the United States to serve as a nanny for the family of a man who had been one of the children she had cared for in Jamaica. He had since moved to the United States and was requesting her assistance in raising his children. This gentleman became her "sponsor" and helped her obtain permanent residency in the United States.

While in Jamaica, the defendant maintained more-or-less steady employment in the construction trades. He also cut hair, and made some money selling arts-and-crafts items that he made. He and his friends drank heavily and smoked marijuana daily. He had several girlfriends. During his last two years, he dated and eventually married Barbara Bell, a teacher. The defendant and Barbara did not

marry until the year after he came to the United States. Barbara was pregnant when he immigrated and their daughter was born prematurely the day after he arrived here. Barbara and the daughter still live in Jamaica. His family recalls that the relationship between Barbara and Mr. Bell was good before he came to the United States. Sisters Diane and Marjorie indicate he took a nontraditional role and would cook and take care of the house while Barbara was going to school. Even after he came to the United States Mr. Bell always sent packages to her and his daughter. Family members who went back to Jamaica were expected to have space to take things back for his wife and daughter.

Mr. Bell's mother was the first to obtain United States citizenship; his father immigrated within a short period of time, after years of traveling to the United States as a temporary worker. His youngest sister Marjorie immigrated in 1990. Mr. Bell immigrated in 1992, and the remaining members of the family living immigrated in the following years. Until very recently, there were two sisters and a brother remaining in Jamaica (sister Nellie died suddenly in December, 2000); a sister living in England, a brother and sister in Chicago and a sister in Canada. It is unclear when the other siblings immigrated to the United States and Canada.

In 1996 the mother became suffered a ruptured aneurysm in her brain, and underwent brain surgery twice. Mr. Bell was reportedly very attentive and worried about her. He would go to the hospital every day. He would take off work "with a doctor's note" and go to see her. Tracy indicated that, "Mom was his world." She was never sick so it surprised

everyone. Mother nearly died, and was rendered virtually nonfunctional because of the aneurysm and surgeries. The family took her illness very hard. She is now a shadow of her former self, and requires constant care. The siblings arrange their shifts to care for Mom. Mr. Bell would often take a shift and help out. He was devastated by the change in his mother. He had been quite dependent on her, and seemed to loose his way after her brain injury.

United States, post-1992: According to Diane and Marjorie, Mr. Bell changed when he made new friends in the United States. When he first came to the US, he was always working. He kept two jobs and was always sending goods back home. He then bought a car and more friends started coming around. Mr. Bell lived on and off with the family, but began to spend less and less time with them. No one admitted it was occurring, but gradually he and his wife drifted apart. He began to go back to Jamaica less and less. He appeared to be doing real well, wearing fancy clothes and jewelry, and driving a new car. Norlene stated that Mr. Bell wanted to have friends and enjoyed being a central figure in social events. He would organize "dances" in the Winchester area. To do so, he would rent a large space and hire "artists" to rap at the microphone. Norlene stated he once held a dance at a club in Berryville and sold tickets for $5 or $10; others sold food. He probably held 3 or 4 dances total. Although Mr. Bell reportedly looked happy here in the United States, his sisters worried that he had the "wrong friends". When pressed to explain, Marjorie stated that there were "words going around on the street" about his friends. When she tried to discuss the

quality of his friends with him, he would act like he did not know what she was talking about.

Mr. Bell's sisters Diane and Marjorie indicate he got "caught up" with other women. He reportedly has four children in the United States. He has one 6-year-old daughter with a woman who lives in West Virginia, Dawn Jones. He also has three children (Eddie "EJ", 3 years, Xavian, 2 years, and Diontre 1 year) with Tracy Nicholson, who lives in Winchester. Little is known about his relationship with Ms. Jones other than that there were incidents of domestic violence in their relationship. Tracy reported she met Mr. Bell when she was a teacher at a daycare where he brought his nieces and nephews to school. They began dating in 1995. In the beginning of their relationship, she and Mr. Bell lived together. Towards the end, he would sometimes go away for a week at a time, and then return home. Generally, he would go to racetracks on weekends and would come and go as he pleased other days. She did not always know where he was, whom he was with, or when he would return. Tracy stated he had other girlfriends but she did not believe the relationships were serious. Mr. Bell's relationships with both Tracy and Dawn are reportedly stormy, and included incidents of domestic violence. Tracy reported that the victim, Officer Timbrook, had once tried to break up a fight between them in a parking lot, and encouraged Tracy to press charges against him. Tracy reportedly refused. She characterizes their fights as "pushing and pulling" and that it was "a two way street".

Tracy stated that Mr. Bell was "all about his kids". When the children were infants, he would feed them in the middle of the night and provide much of their care. He loved taking the children fishing. Tracy reported that he was also very good with her older daughter Alyse. He would play with the "play station" with her and was very protective of her. Although he provided no formal child support payments, Tracy indicated Mr. Bell would buy whatever she needed when she needed things (e.g., diapers, etc.). He would take his jewelry to the pawnshop to get money for her. Tracy reported that she did not care about formal child support payments even though coworkers have encouraged her to pursue the issue.

Marjorie, Diane and Norlene were all quite hesitant to admit to any knowledge of Mr. Bell's drug use or abuse. Sister Nellie said that there was never any drug use. She described the family as "a Christian family and we do not use drugs." Sisters Marjorie and Diane also state that there were no concerns of him using drugs in Jamaica. Mr. Bell, however, indicated that he first began using drugs and alcohol when he was a very young child. He reported that his older relatives would give him rum and marijuana because he would become very playful and sing and dance, which was entertaining for them. Mr. Bell further stated that he has used marijuana daily until the night before his arrest. Other significant drug use is denied.

According to all sisters, none of the siblings were ever in legal trouble. Nellie stated that in Jamaica the police are much more likely to "guide" or turn adolescents over to their parents for discipline,

rather than arrest young people. Mr. Bell's arrests in the United States are very shocking for the family and they are all having a very hard time trying to understand it. The first the family knew he was in trouble was the "weapons change" about two years ago. Tracy indicated that when Mr. Bell was planning the "dance" he held in Berryville, he decided he wanted to have a bulletproof vest. He went to a military supply store to purchase one, carrying a concealed weapon. The owner of the store saw his gun and phoned to police to report him. Tracy's understanding was that he had the gun registered but he didn't have a permit to carry it. The police officer that was killed was the one who arrested him on this weapons charge. This charge was eventually reduced to a misdemeanor because he had registered the gun.

Tracy indicates that she did not know Mr. Bell's family until after his arrest. His sister Donna is very supportive and helps with the children. The defendant's sisters help by picking up the children from daycare and taking care of them on the weekends. Currently Marjorie and Diane, and their respective children, live in a family house in Winchester with their parents. Father (63 years old) still works 6 days a week. Father still picks apples on the weekends. The oldest sister Nellie died very suddenly in December. Marjorie (and possibly other sisters) flew to Jamaica to plan her funeral and settle her affairs, including attempting to figure out who will raise her children.

CONCLUSIONS

As I conveyed to Mr. Williams during our meeting on December 14, 2000, the presentation of an effective mitigation case depends less on which information is presented, than on who is doing the presenting. In considering my possible involvement as a conduit for some of the above information, we reviewed the following issues:

1. There is uncertain value in presenting mitigation evidence to the jury via a mental health expert, especially where issues of mental illness, past trauma, insanity, etc. are not in play, as is so Mr. Bell's case. The primary risk in using the 3:1 expert pertains to opening the door for the Commonwealth's own mental health expert. The risks here have to do with the unintended introduction of aggravating factors during my cross-examination, as well as the more obvious risks of having the Commonwealth's expert reframe my direct testimony as depicting aggravating rather than mitigating factors (e.g., the double-edged sword of a history of child abuse: it suggests that a defendant was rendered vulnerable by the abuse, but could also be refashioned quite correctly into a factor that contributes to an increased risk for future criminal behavior and violence.)
2. Additional risks are introduced in Mr. Bell's case by his 1) apparently having attempted to malinger or "fake bad" on the neuropsychological testing that I administered, and 2) his offering me information that flies in the face of what the

jury will most like hear from other more sympathetic witnesses. This information would most likely be adduced during my testimony, and could have an adverse and strongly prejudicial impact on the jury's decision making.

3. The testimony of lay witnesses and lay experts tend to be credited by juries in capital cases, whereas juries tend to have negative biases regarding the role and testimony of mental health experts. For this reason, it is often prudent not to look to the mental health expert to present the biographical mitigation narrative, but to use other witnesses (family, friends, correctional staff, etc.) instead the appointed 3:1 expert.

By the end of my meeting with Mr. Williams, he had conveyed your intention not to use my testimony at the penalty phase in Mr. Bell's case. This decision followed our lengthy discussion of the above issues, along with consideration of several hypothetical strategies for the presentation of a mitigation case. Considering the totality of the information and issues present in this case, I concur with your decision, as it is consistent with my own impressions and recommendations.

I hope that this information is helpful as you prepare for Mr. Bell's upcoming trial. Please feel free to contact me at any time should you require further assistance.

Very truly yours,

/s/ Connie JA Beck Ph.D
Connie Beck, Ph.D.
Forensic Psychology Fellow

/s/ William L. Stejskal, Ph.D
William L. Stejskal, Ph.D.
Licensed Clinical Psychologist

AFFIDAVIT

MARK B. WILLIAMS and **JUD A. FISCHEL,** first being duly sworn, state as follows:

1. We represented Edward Bell at trial and sentencing on his capital murder and related charges. We have read the petition for a writ of habeas corpus filed by Bell in the United States District Court. Our statements in this affidavit are based upon personal knowledge and records kept in the ordinary course of business.

2. After our representation of Bell concluded, we turned our files over to Bell's habeas corpus counsel and we cooperated with and assisted his habeas counsel. We executed affidavits for Bell's habeas counsel, which were presented to the state and federal habeas courts. When the state habeas petition was filed, the Warden's counsel from the Attorney General's office contacted us but we declined to communicate with her about the case. No hearing was ordered in state court on Bell's habeas claims. When we were advised that a hearing had been ordered on Bell's claim of ineffective assistance at sentencing, we agreed to meet with the Warden's counsel and provide her with our expected testimony. We provided her with documents from our files.

3. Jud Fischel was licensed to practice law in Virginia in 1978 and, at the time of Bell's trial, about 70% of his practice was criminal law. Jud had represented four (4) other clients in death penalty cases. Two (2) resulted in jury recommendations for life sentences. One resulted in an acquittal after the Defendant's first conviction of a reduced charged of 1st degree murder was set aside. The other resulted

in a negotiated result for life sentence in the Federal sentence in exchange for a dismissal of state capital charges. Jud has been on the Virginia Public Defender Commission's list of qualified capital defense attorneys since the list was begun. For five years before he attended law school, Jud was a juvenile court probation and parole officer who regularly investigated the backgrounds of those whom he supervised. He has served 16 years as a substitute judge in the state District Court system. He was specially appointed to preside over mental commitment proceedings. He has taught undergraduate courses and graduate level courses in criminal justice at his alma mater, American University as well as Northern Virginia Community College.

4. Mark Williams was licensed to practice law in 1990 and, at the time of Bell's trial, about 60% of his practice was criminal law. Bell's case was Mark's first capital murder case. He since has been included on the list of qualified capital counsel by the Virginia Public Defender Commission. He previously had tried three first-degree murder cases. Before Mark went to law school, he was a social worker, working for the Spotsylvania County Department of Social Services for eight years. He was the social work supervisor for the Fauquier County Department of Social Services for fifteen years. After law school, he also served as counsel for the Fauquier County Social Services Department's for five years.

5. When Lloyd Snook's motion to withdraw from representation of Bell was granted by Judge Hupp and Marie Deans - the "mitigation specialist" appointed in the case - failed to do any work on the

case, Jud Fischel expressly sought the appointment of Mark Williams because of Mark's extensive experience as a social worker and ability to perform investigations, obtain background information and interview witnesses, as well as his murder trial experience. Jud had used a "mitigation expert" in a previous case and was not impressed with her abilities: she did not get along with his staff, his requests of her were unmet and the information she obtained was produced too late to be useful. We did not seek the appointment of another "mitigation specialist" because we considered ourselves better qualified to do our own investigations.

6. Additionally, we did not need any additional investigative assistance because we obtained the services of Dr. William Stejskal, a highly credentialed and experienced psychologist from the Institute for Law and Psychiatry at the University of Virginia who was appointed by the court as an expert in mitigation. Jud had used Dr. Stejskal in another capital case with some success and was pleased with his assistance. Dr. Stejskal performed an extensive investigation and evaluation of Bell. (Attachment 1, Dr. Stejskal's report).

7. As seen from the report, Dr. Stejskal examined the case and Bell and prepared a dynamic and thorough case history. Dr. Stejskal interviewed Bell's family and found Bell had been an early and persistent drug-abuser. Bell came from a large, strongly Christian family in Jamaica, most of whom emigrated to this Country and became hard-working citizens. Bell was the only son and a spoiled "Mama's boy." His sisters told Dr. Stejskal that Bell was the favorite sibling and was not disciplined as harshly as they were. Bell denied this and

maintained that his sisters were treated more favorably than he was. Bell maintained employment in Jamaica but when he moved here he fell in with "wrong friends" and started seeing women even though his wife and child were in Jamaica. He eventually had four children here by two different women. Bell had domestic violence incidents with both women, one of which involved Police Officer Timbrook whom Bell was later convicted of murdering. Bell provided no child support but did buy the children gifts. No one in the family except Bell was ever in trouble with the law. (Attachment 1).

8. Dr. Stejskal noted that "Jamaican school, military and criminal records were pursued through the offices of the Ambassador of Jamaica in Washington, D.C." and that "the Embassy of Jamaica indicated that their staff had no success in retrieving any Jamaican institutional records." Additionally, "[f]amily members in Jamaica were also unsuccessful in obtaining any of this information." (Attachment 1).

9. Dr. Stejskal administered a battery of tests to Bell, including an IQ test. He concluded that Bell's scores were not reliable because Bell seriously, malingered on them. Dr. Stejskal found Bell was not mentally retarded, did not have any brain damage and told us Bell had an "average criminal mentality." He concluded that Bell suffered from no mental illnesses and did not qualify for the statutory mitigating factors of acting under extreme mental or emotional disturbance at the time of the offense and being unable to appreciate the criminality of his conduct and conform his conduct to the requirements of the law. (Attachment 1).

10. Dr. Stejskal told us not to use him as a witness. He said, "I would only hurt you." He explained that aggravating factors might come in during his cross-examination and if we called him to testify, that would trigger the Commonwealth's right to its own expert who would recharacterize Bell's history as aggravating. Dr. Stejskal pointed out that Bell's information, given to him during the evaluation which "flies in the face" of the evidence, might come out. Although Bell had told the police that he was present when Officer Timbrook drove up, got out of his car and began chasing him, Bell told Dr. Stejskal another story: that he was walking home from gambling when he was chased by "a black dude" and, when he climbed through a basement window to elude this black man, he heard a gunshot. Needless to say, we followed Dr. Stejskal's advice.

11. Bell spoke with a heavy accent but we could communicate with him. He was not slow or dull-witted and he certainly was not retarded as evidenced by the fact that he filed numerous motions in the trial court that he created, wrote and filed himself. We explained to him the importance of mitigating evidence and of providing us with the names of anyone who might provide such evidence. Bell insisted he did not commit the murder and his response to almost anything we told him about the evidence was that "it didn't happen." Even though we clearly and expressly counseled him that he had to prepare for the possibility of a guilty verdict, he was convinced he would be acquitted and simply would not face the possibility he might be found guilty and have to confront mitigation issues.

12. He said he had no friends who could testify. His mother was incompetent from surgery for a

brain aneurism. We asked him and his sisters whether there was any history of alcohol abuse or physical abuse and they denied there was. We had Dr. Stejskal's thorough background and case history. His sister that we wanted to present as a witness died suddenly before trial. Another sister in Winchester suffered from depression and did not want to testify. We spoke to Tracy Nicholson, one of the mothers of Bell's children, and her, mother, Joanne, but would not have used them as witnesses because we knew that Bell was involved in violent domestic disturbances with Tracy. Also, we did not want the jury to hear that Bell left his wife and infant child in Jamaica while he had illegitimate children with Tracy and another woman in this Country.

13. We knew enough about Bell's family and his own history to know that we did not want to present to a jury in Winchester evidence that Bell was a drug user and adulterer with children by different women. In our opinion, this would have demonstrated that he engaged in illegal and immoral conduct and would have supported the Commonwealth's case for future dangerousness.

14. Significantly, we did not want to highlight for the jury the fact that Officer Timbrook's widow was pregnant when he was murdered. If we had paraded Bell's children before the jury or presented evidence that he enjoyed a loving relationship with those children, the Commonwealth's Attorney would have cross-examined those witnesses to show, and argued to the jury, that Bell prevented Officer Timbrook from ever even seeing his unborn son, much less being able to enjoy a loving relationship

with him. Such an argument would have been devastating to any plea from us for mercy.

15. But most importantly, from our experience, we knew that when the client insists he did not commit the crime and that we will be vigorously denying guilt, the sentencing options are, practically speaking, few, and especially in a case like Bell's where there are no truly mitigating factors in his background such as horrific child abuse or mental illness or retardation. Jud had tried other capital murder cases in which he used the "defendant's history mitigation" defense at sentencing, and Mark has done so in a capital case since Bell's trial, but only where the defendant's guilt was clear and not contested. Based on our experience trying cases to juries, we firmly believed, and still believe, that a presentation of inconsistent positions between the guilt and sentencing phases is a very risky proposition that almost certainly will backfire.

16. In our experience, juries turn on lawyers – and punish their clients more harshly – who tell the jury during the guilt phase that their client is innocent but, when found guilty, tell the jury it should excuse his behavior because of his childhood or drug abuse. We were not going to insult the jury and risk losing their respect and possible leniency with such a strategy.

17. Instead, we followed a four-part plan: obtain Dr. Stejskal and hope he found mitigating factors; become friends with the victim's family with an eye towards winning their opposition to a death sentence; attempt to get into evidence witnesses who would say that Bell would not be dangerous under strict prison confinement for life; and present family

witnesses who would let the jury know that the crime had an impact on them as well as the Timbrooks. We obtained Dr. Stejskal but he could testify to no mitigating factors. Jud became a friend to the Timbrooks. Mr. Timbrook praised Jud's work and continues to do so, but the Timbrook family was ultimately in favor of a death sentence. We offered prison condition evidence. Jud had employed this in a particularly vile case prior to Bell with great success but the trial court prohibited it. We appealed that ruling. The Virginia Supreme Court affirmed the trial court. Finally, although the sister we wanted to use died unexpectantly, we did present testimony from another sister and from Bell's father.

18. We consulted with Professor Roger Groot at the Washington and Lee Capital Case Clearinghouse, as well as other experienced capital defenders and members of the Bar in the Fauquier and Winchester area. We heard no opposition to our approach. Professor Groot told us that, if you fight too hard in the guilt phase, there is a high probability your client will receive a death penalty. We had no choice but to fight in the guilt phase because our client insisted on it and because we believed we had valid arguments that the Commonwealth's circumstantial case did not prove guilt beyond a reasonable doubt.

FURTHER, THESE AFFIANTS SAYETH NOT.

/s/ Mark B. Williams
MARK B. WILLIAMS

/s/ Jud A. Fischel
JUD A. FISCHEL

COMMONWEALTH OF VIRGINIA
COUNTY OF FAUQUIER, to-wit:

Subscribed, sworn, and acknowledged before me by **MARK B. WILLIAMS** and **JUD A. FISCHEL** on this 13th day of June, 2006.

/s/Carmen E. Roland
Notary Public

My commission expires: 3/31/09

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,	:	
	:	
Petitioner,	:	
	:	
v.	:	Case No. 7:04CV00752
	:	
LORETTA KING,	:	
WARDEN,	:	
SUSSEX I PRISON,	:	
	:	
Respondent.	:	

DECLARATION

I, Marie Deans, hereby state the following:

1. I have worked on over 200 capital cases as a mitigation specialist. My work as a mitigation specialist sometimes takes me abroad, when the defendant was born and/or grew up in a foreign country. I have traveled to Mexico and to St. Lucia to conduct mitigation investigations.

2. In February of 2000, I was appointed as a mitigation specialist to assist attorneys defending Edward N. Bell against a charge of capital murder. I met with Mr. Bell for a two-hour interview. At that time, I knew that Mr. Bell had been born in Jamaica and grew up there.

3. After my initial interview with Mr. Bell, trial counsel failed to provide me with contact information for Mr. Bell's family, and other information and direction necessary to permit me to begin a mitigation investigation.

4. Because Mr. Bell was born and grew up in Jamaica, I knew from the start that my investigation would take me to Jamaica. Direct interviews with family members, friends, teachers, ministers, and others who knew the defendant as a child and while he grew up are indispensable in compiling a proper social history for mitigation purposes. You cannot establish the trust necessary for family members to reveal problems that affected the client in other than face to face, focused interviews.

5. Had counsel for Bell ever utilized my services, I would unquestionably have insisted on traveling to Jamaica and conducting a mitigation investigation there. The only reason I did not is that Bell's trial counsel never availed themselves of my services.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 17, 2006.

/s/Marie Deans
Marie Deans

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Illinois #071-006010, Indiana #20041376A,
Louisiana #794, New Mexico #0768,
Oklahoma #1002, Oregon #1333, South Carolina
#764, Tennessee #2255, Texas #22351

EDWARD N. BELL,

Petitioner,

v. **Case No. 7:04CV00752**

LORETTA K. KELLY,
WARDEN, SUSSEX I
STATE PRISON

Respondent.

Expert Report of Mark D. Cunningham, Ph.D., ABPP

1. I am a clinical and forensic psychologist, licensed as a psychologist in the States of Arizona, Arkansas, Colorado, Connecticut, Idaho, Indiana, Illinois, Louisiana, New Mexico, Oklahoma, Oregon,

South Carolina, Tennessee, and Texas. Please see my curriculum vitae attached.

2. To summarize my credentials in narrative form, I received a Bachelor's degree in Psychology from Abilene Christian College in 1973, a Master's degree in Psychology from Oklahoma State University in 1976, and a Ph.D. in Clinical Psychology from Oklahoma State University in 1977. I completed a one-year internship in clinical psychology at the National Naval Medical Center of Bethesda, Maryland. I subsequently served as an active duty Clinical Psychologist at the Naval Submarine Medical Center in Groton, Connecticut from 1978 to 1981. I was an assistant professor of psychology at Hardin-Simmons University in Abilene, Texas from 1981 to 1983. I have maintained a private practice in clinical and forensic psychology with offices in Texas since 1981.

3. I was board certified in Forensic Psychology in 1995 by the American Board of Forensic Psychology, a specialty board of the American Board of Professional Psychology (ABPP). This distinction follows a rigorous examination process and is held by approximately 220 psychologists in the United States. I have served as a work sample reviewer and oral examiner for the American Board of Forensic Psychology. I have provided forensic evaluation services in over 450 cases. I have participated in extensive continuing education in the area of forensic psychology.

4. I have been recognized as a clinical and forensic psychology expert in testimony regarding capital sentencing determination issues including mitigation and "future dangerousness" in both state

and federal courts. These include approximately 45 federal capital cases and approximately 75 state capital cases since 1995, in jurisdictions including Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Puerto Rico, South Carolina, Virginia, and West Virginia. I have provided declarations/affidavits and testimony in state postconviction and federal habeas proceedings.

5. I am the first author or co-author of approximately 20 scholarly papers regarding forensic psychology published or "in press" in peer reviewed journals, scholarly texts, and professional periodicals. I am the author or co-author of other scholarly papers that are under review. The above scholarly works have primarily addressed capital sentencing considerations and standards, death row inmate capabilities and characteristics, diagnostic classification issues at sentencing, and violence risk assessment. I have served as an ad hoc reviewer for three peer reviewed journals.

6. The American Academy of Forensic Psychology (AAFP) is an association of psychologists who have been board certified by the American Board of Forensic Psychology. A primary mission of the Academy is to raise the standard of practice of psychology to the courts. Accordingly, the Academy conducts continuing education workshops on various forensic psychology applications. At the request of and under the auspices AAFP I have provided full day workshops on "The role of the forensic psychologist in death penalty litigation" (i.e., March

1998 - Milwaukee, Wisconsin; February 1999 - Austin, Texas; January 2000 - Monterey, California; February 2002 - San Diego, California; September 2003 - Cincinnati, Ohio; January 2005 – LaJolla, California). These workshops emphasized research literature, statistics, and conceptualizations relevant to assessments of capital defendants. Under the auspices of the Texas Psychological Association, in November 2003 in Dallas, Texas I provided a similar full day continuing education workshop for psychologists regarding capital sentencing evaluations.

7. My scholarly activities have resulted in significant recognition by my peers. I am the recipient of the *2006 American Psychological Association Award for Distinguished Contributions to Research in Public Policy*. This award is conferred on one psychologist annually who has made distinguished empirical and/or theoretical contribution to research in public policy, either through a single extraordinary achievement or a lifetime of work. I was honored with the *2005 Texas Psychological Association Award for Outstanding Contribution to Science*. This is an annual award in recognition of significant scientific contribution in the discovery and development of new information, empirical or otherwise, to the body of psychological knowledge. I was the recipient of the *2004 National Association of Sentencing Advocates John Augustus Award*. I have received other distinctions and honors.

8. I began providing expert forensic psychology evaluations at capital sentencing in 1995 and was heavily engaged in this activity in 2001. I began regularly attending regional and national capital

defense training conferences for attorneys and mitigation specialists in 1996. I am well aware of capital mitigation conceptualizations, capital mitigation investigation methods and standards, and capital violent risk assessment methodology and data that were widely disseminated in 2001.

9. Postconviction counsel for Mr. Edward N. Bell have requested that I describe expert forensic psychology testimony that could have been offered at Mr. Bell's capital sentencing trial in January 2001 regarding mitigation and violence risk assessment.

10. In preparing this analysis, I have reviewed the transcript of the capital sentencing phase of Mr. Bell's trial held in January 2001, the Presentence Investigation Report dated 5-18-01, and affidavits by many third parties. I have also relied on the investigation information gathered by Carmeta Albarus, LCSW. I have not interviewed or directly assessed Mr. Bell. Similarly, I have not directly interviewed any third parties. The principal drawback of not comprehensively interviewing Mr. Bell and third parties is that additional mitigating factors may remain unidentified, and the psychosocial history lacks anecdotal and clinical detail that might have been provided in response to expert probing. This risk is amplified by the limited time that was available for Ms. Albarus to conduct her mitigation investigation. Given the primary reliance of capital violence risk assessment on group statistical data and behavior displayed by Mr. Bell during his pre-trial confinement, it is anticipated that information derived from direct interview of him would have very modest or no impact on the risk assessment analysis and findings. With these

limitations noted, the following findings are offered with a reasonable degree of psychological certainty.

11. Consultation procedures:

Records reviewed:

Transcript of sentencing phase of Commonwealth of Virginia vs. Edward Nathaniel Bell, Docket Numbers 99CR478, 489 2000CR2, 3; dated 1-26-01

Presentence Investigation Report dated 5-18-2001

Summaries of interviews by Carmeta Albarus with:

Edward Bell: 4-26-06, 4-28-06
Dorothy Nicholson (mother of Tracy): 4-24-06
Oswald Bell (father): 5-20-06
Donna Bell Lindsay (sister): 5-20-06
Diana Bell Howard (sister): 5-20-06
Wilber Afflick (maternal half brother): 5-20-06

Summary of 4-25-06 joint interview of:

Oswald Bell (father)
Rosaline Bell (mother)
Narlene Bell (sister)
Donna Bell Lindsay (sister)
Diane Bell Howard (sister)

Expert Report of Carmeta Albarus, LCSW dated 6-2-06

Affidavit of:

Charles Clarke (Jamaican family friend and co-worker) dated 5-9-06
Vinel Thompson (father of Paul Johnson), dated 5-9-06
Eric Samuels (Jamaican friend and co-worker), dated 5-9-06
Lennon Sewell (Jamaican friend and co worker), dated 5-9-06

Angellita Hamilton (Jamaican friend of police officer), dated 5-9-06
Evelyn Downer (Jamaican basic school teacher), dated 5-9-06
Carl Downey (Jamaican friend and roommate), dated 5-9-06
Johanna Davis (maternal aunt), dated 5-9-06
Marva Sewell Downie (Jamaican friend and neighbor), dated 5-9-06
Peter Aubrey (Jamaican childhood friend), dated 5-9-06
Dorothy Downer (Jamaican friend), dated 5-9-06
Barbara Williams (ex-spouse), dated 5-9-06
Harold Anderson (maternal first cousin), dated 5-9-06
Carol Anderson (former sister-in-law), dated 5-9-06
Rondel Dixon (cousin), dated 5-9-06

12. **Section I** outlines adverse developmental factors and experiences in Edward Bell's history that singularly and collectively increased the likelihood of psychological and social maladjustment, morality deficits, poor impulse control, poor judgment, substance abuse and dependence, criminal activity, and violent criminal offending. These factors were *entirely* absent from the defense evidence offered at Mr. Bell's capital sentencing. Each adverse developmental factor detailed in this section is accompanied by a discussion of the mitigating implications of this factor, and in many cases, associated research available in January 2001.

13. **Section II** describes Mr. Bell's potential for a positive and nonviolent adjustment to prison during a capital life term. Methodology and data relevant to a reliable violence risk assessment that could have

been presented at Mr. Bell's capital sentencing phase are also reviewed.

14. The mitigating factors and implications detailed in Section I, and the positive prison adjustment (i.e. violence risk assessment) conceptualizations and research data of Section II, were, with even limited investigation, reasonably available to defense counsel and mental health experts, had any been called, at Mr. Bell's capital murder sentencing trial in January 2001.

Section I: Mitigating Factors

15. The defense put forward no testimony at capital sentencing describing Mr. Bell's childhood or his experience of adverse developmental factors. Apart from brief testimony describing the impact of his sentence on his family, the defense offered *no* testimony in mitigation. This inexplicable failure allowed the Commonwealth to repeatedly assert that there was absolutely no mitigation for the jury to consider in determining Mr. Bell's death-worthiness:

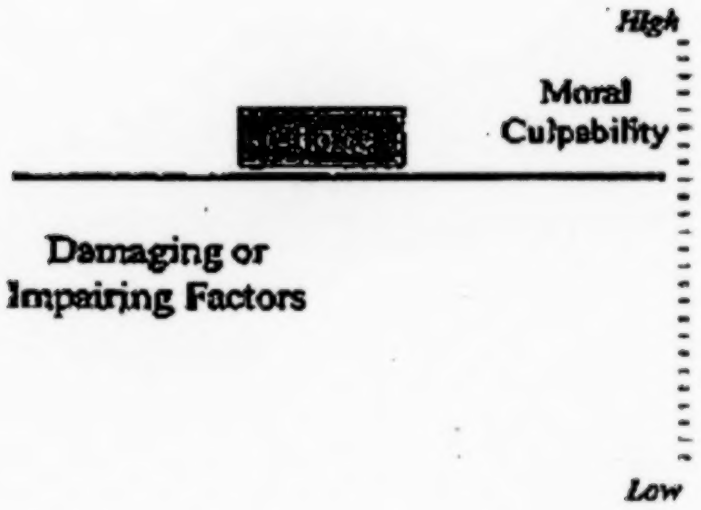
> Mr. Thompson: This is not an individual, ladies and gentlemen, who has produced one shred of evidence of mitigation. (page 2925/2416, lines 15-17)

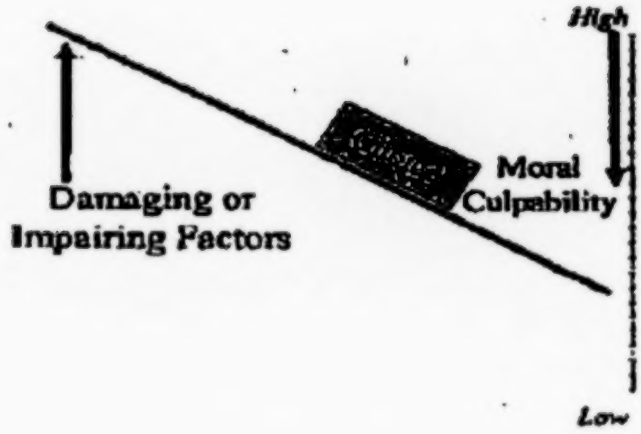
> Mr. Thompson: There is no mitigation in this case, ladies and gentlemen. There is no mitigation evidence in this case. There has been no evidence presented by the Defense, or through any other witnesses in this case in mitigation. (page 2927/2418, lines 16-20)

> Mr. Thompson: The relationship that Edward Bell has to authority and law enforcement has absolutely not one shred of mitigation to it. (page 2937/2438, lines 21-23).

16. As will be detailed in this section, the failure of the defense to offer adverse developmental factors was not occasioned by the absence of these in Mr. Bell's history. Quite the contrary, there are a number of such adverse developmental factors in Mr. Bell's background that would have become apparent with even cursory investigation.

17. There were also ample scholarly perspectives and data available in 2001 demonstrating a nexus between adverse developmental factors and delinquency, criminality, and violence in adolescence and adulthood. The experience of being adversely shaped or limited by forces not personally chosen, or chosen as a minor, is critical to considerations of moral culpability - a concept at the heart of mitigation (*Burger v. Kemp* 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), citing *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976). The choices exercised by a defendant in a capital offense may have been shaped by the formative influences of multiple adverse developmental experiences. The relationship of developmental damage and other impairing factors to the exercise of choice, and subsequently to moral culpability is illustrated in the graphic models below. As the damage and impairing factors (e.g. neglect, abuse, psychological disorder, neuropsychological deficits, substance dependency/intoxication, etc.) increase, choice is exercised on an increasing slope, and moral culpability is correspondingly reduced.





18. The greater the damaging or impairing factors, the steeper the angle or slope on which the choices are made, the lower the level of moral culpability. This is the rationale of the Atkins decision – i.e., mental retardation represents such a significant impairment that the afflicted defendant simply cannot possess the requisite level of moral

culpability to be eligible for the death penalty. Of course, an analysis of moral culpability is not limited to mental retardation. Rather, formative or limiting impact from any source of developmental damage or impairment is relevant in weighing of moral culpability and the capital defendants position on this continuum.

19. Adverse developmental factors may have both an individual and combined effect on developmental trajectory and the risk of problematic adolescent and adult outcomes – including criminal violence. Further, according to a review of existing studies published by the U.S. Department of Justice, the risk of violent criminal outcome increases as the number of adverse life factors increases (Hawkins et al., 2000). Thus the cumulative saturation of risk factors can be critical to the outcome.

20. In addition to cumulative saturation, the research literature further identifies that outcome is a function of the interaction of risk, vulnerabilities, and protective factors (Masten & Garmezy, 1985; Gilgun, 1990; U.S. Department of Justice, 1995; Hawkins et al., 2000). For example, Gilgun (1990) described the broad interaction of risk and protective factors in terms of:

Trauma (sexual, physical, psychological, neglect);

Predisposing and contextual factors (genetic, neurological and physical vulnerabilities, troubled interpersonal relationships, accidents of the environment);

Protective factors (secure attachments in infancy and early childhood, supportive relationships, awareness of childhood pain, supportive confidant).

21. Thus Mr. Bell would be expected to be at greater risk for adverse outcomes in the community in adolescence and adulthood if many damaging developmental factors and few protective factors were present. The analysis of risk, vulnerabilities, and protective factors in the etiology of criminal violence is quite similar to explanations of who gets cancer: i.e. carcinogen exposure, predisposing factors, and protective factors. All of the children growing up in a neighborhood built on top of a toxic waste dump do not get cancer - rather these children as a group experience a markedly increased incidence of cancer as compared to more benign settings. Similarly, a history of profoundly adverse developmental experiences does not invariably result in a criminally violent outcome - only a much increased likelihood of it (Hawkins et al., 2000; U.S. Department of Justice, 1995). Everyone need not totally succumb to the toxic exposure for it to be implicated.

22. More specifically, research sponsored by the U.S. Department of Justice regarding the precursors of serious and chronic delinquency, criminality, and criminal violence have identified a number of risk factors for these pathological outcomes, with odds ratios in parenthesis (Hawkins et al., 2000), as well as protective factors (U.S. Department of Justice, 1995). These are listed below, with those present in Mr. Bell's development *in italics*.

U.S. Department of Justice risk factors

Individual factors

Hyperactivity, concentration problems, restlessness, and risk taking (x 2 - 5)
Aggressiveness (x 1.5 - 6)
Early initiation of violent behavior (x 6)

Involvement in other forms of antisocial behavior
Beliefs and attitudes favorable to deviant or antisocial behavior

Family factors

Parental criminality (x 0 - 3.8)
Child maltreatment
Poor family management practices (x 2)
Low levels of parental involvement
Poor family bonding and family conflict
Residential mobility (+)
Parental attitudes favorable to substance abuse and violence (x 2)
Parent-child separation

School factors

Academic failure
Low bonding to school
Truancy and dropping out of school
Frequent school transitions
High delinquency rate schools

Peer-related factors

Delinquent siblings
Delinquent peers
Gang membership (x 3-4)

Community and neighborhood factors

Poverty (x 2)
Community disorganization (crime, drug-selling, gangs, poor housing)
Availability of drugs and firearms
Neighborhood adults involved in crime
Exposure to violence and racial prejudice

Situational factors

U.S. Department of Justice Protective Factors

Individual characteristics

Female gender
Intelligence
Positive social orientation
Resilient temperament

Social bonding to positive role models

Family members
Teachers
Coaches
Youth leaders
Friends

Other protective factors

Healthy beliefs and clear standards for behavior, including those that promote nonviolence and abstinence from drugs.

Effective early interventions

23. Inspection of these DOJ specified factors in light Mr. Bell's history reveals that he had one of the individual risk factors, 6 family risk factors, 3 school risk factors, and 4 community/neighborhood risk factors. These represented a significant cumulative risk exposure. These risk factors were particularly ominous as Mr. Bell had only the partial presence of perhaps two protective factors.

24. In addition to the DOJ specified factors notes above, Mr. Bell was impacted by other formative adverse developmental factors. Such factors in Mr. Bell's background included the following:

Multi-generational family dysfunction

Intellectual deficiency

Childhood onset alcohol and drug abuse and dependency

Recurrent head injuries

Recurrent absence of and estrangement from his father

Physical abuse

Domestic violence and corruptive relationship modeling of parents

25. A more specific discussion of major adverse developmental factors experienced by Mr. Bell, as well as their history and implications is described in the sections that follow. Mr. Bell will be referred to as "Edward" throughout this section of the report as this reference is most descriptive of his child status in discussing his developmental experience, and reduces the potential for confusing him with male relatives.

Generational family dysfunction:

26. There is evidence of significant dysfunction in Edward's family system from generation to generation. The parent-child bonds in this family system were tenuous at best. According to family history gathered by Carmeta Albarus, the paternal grandfather, Clifton Bell, could not be relied upon to support his family as he repeatedly gambled away the household income. He was also described as being brutal in his "discipline," characterized by his administering frequent beatings. Economic demands to help support the household resulted in Oswald Bell (Edward's father) forgoing schooling at an early age to begin working. The maternal grandmother, Hilda Kettle, had seven children by three men. It is questionable whether she was married to any of them. Hilda gave away her first three children to relatives when she became involved with Clifton Bell.

27. Despite extraordinarily limited financial means, Rosaline Henry (Edward's mother), had had eight children by three relationships, all out of wedlock, prior to meeting Oswald Bell. In fact, she was already pregnant by Mr. Afflick with a 9th child at the time she became involved with Oswald in 1961. Rosaline's capacity to effectively bond to her children is also much in doubt. Her first eight children were distributed to various relatives to rear, and she retained custody of *none* of them during her relationship and marriage with Oswald. Though residing in poverty in a two-room shack, Rosaline and Oswald had four more children (and she was pregnant with a fifth) when they ultimately married in April 1969.

28. As will be detailed below, Oswald's ability to sustain emotionally healthy family relationships was compromised. He was recurrently absent from the home (in Jamaica) for months at a time working in the United States. When home he was routinely physically abusive to Edward, and violent with Rosaline on occasion. Rosaline was ineffectual in intervening to protect Edward from his father's maltreatment, resulting in Edward repeatedly seeking temporary shelter with relatives.

29. Elements of this disorganized family structure and irresponsible sexuality continued with a number of Edward's siblings. For example, Beulah had seven children by four different men. Mildred had three children by men whose names were "unavailable." Wilbert has three children by three women, only one with his spouse. Narlene has three out of wedlock children by two men. Donna has four children by three men. Marjorie has five children by

four men. Edward's parenthood pattern reflects the same legacy. He has five children by three women.

30. Not surprising in a family system where siblings are separated and reared independently of each other, a low value was placed on siblings having a cohesive identification with each other, and the quality of relationship between them was compromised. Edward described his sisters as being instruments of his father's abuse, assisting in keeping him locked in a room or depriving him of food. He also described being jealous of them.

31. Narlene, Edward's older sister, suffered an apparent psychotic episode in her early-mid adolescence. She described disturbed perceptions, beliefs, and behavior for an extended period of time. This was subsequently attributed to a "spell" by her and family members. There was also marijuana abuse by Edward's siblings as minors.

Implications of generational family dysfunction:

32. Family history is critically important to character and background through several fundamental processes. First, some personality characteristics, behavior patterns, and social vulnerabilities are genetically transmitted. For example, there is evidence of genetic predisposition to a variety of psychological disorders including schizophrenia, mood disorders, personality traits and disorders, and substance dependence. This predisposition may be expressed through "partial genetic penetration" of traits or through the respective disorder.

33. Second, other characteristics and behaviors are transmitted across generations by family "scripts." To explain, family scripts are broad

outlines of behavior and life sequence that are conveyed both verbally and more importantly by example in the lives of parents, grandparents, siblings, and extended family. School dropout, pregnancy out of wedlock, poor parenting, child maltreatment, domestic violence, substance abuse, criminal activity, and/or many other maladaptive behaviors may be extensively represented in a family system from one generation to the next through the operation of scripts.

34. Third, individuals tend to model their behavior after the behavior of family members in proximity to them in childhood, whether or not these "role models" are positive. In Edward's multigenerational family system, "role models" presented lives characterized by transient relationships, poor sexual boundaries, volatile reactions and relationships, abandonment of children, and other deviant processes.

35. Other maladaptive behaviors, including criminal activity and violence, may be the result of sequential emotional damage. In other words, individuals who have been significantly emotionally damaged in childhood come into adulthood with limited emotional resources, and as a result may not parent their own children humanely or effectively. Consistent with this observation, Green (1988) reported that "the childhood history and background of abusing parents include a high frequency of physical abuse and neglect, scapegoating, maternal deprivation, and exploitation" (843). The children of these damaged and abusive parents are, in turn, emotionally damaged themselves and thus at greater risk for broad adverse adult outcomes including abuse and neglect of their own children, substance

dependence, criminal activity, and violence. Because effective emotional regulation, interpersonal relationship capacity, and social functioning throughout life rely on the quality of relationship and attachments to parents and siblings in childhood, deficiencies in the quality of these first relationships result in fundamental damage to the foundations of personality and interpersonal functioning. The problematic effects of these disrupted relationships may not be evident until adolescence or adulthood (Cantelon, 1994; Staub, 1996).

Intellectual deficiency:

36. Psychometric data regarding Edward's intellectual functioning, such as from a Wechsler scale or Stanford-Binet, have apparently not been gathered. Further problematic, the 30 years that have passed since Edward was in grade school as well as record keeping and psycho-educational intervention limitations in Jamaica have also resulted in any school-based assessments being unavailable. Acknowledging these limitations in the data, history obtained by Carmeta Albarus points to Edward having suffered deficient intellectual capabilities since early childhood. Edward's family recalled that he was "very slow" in his comprehension, responses, and behavior. Evelyn Downer, "basic" school teacher, reported that Edward was noticeably slower than his peers and required special attention to complete his work. Edward was referred to by the nickname "Slow" or "Natty Slow" in the family and community. Marva Sewell Downie who has known Edward from childhood described that Edward earned this characterization by being slow at everything that he

did. Edward additionally recalled that in the community he was referred to as "Big Head and No Brains." There were reports that point to intellectual deficiency in adulthood as well. Dawn Jones, former girlfriend and mother of Kydesha, described filling out the Western Union forms when Edward sent money back to Jamaica for his daughter Kamille. Joanne Nicholson (Tracy's mother) reported that because of Edward's slowness, Tracy handled the finances of their joint household. Joanne also reported that Edward's intellectual slowness contributed to his co-worker conflicts and employment problems. Co-workers described Edward's work duties as being repetitive and menial.

Implications of intellectual deficiency:

37. Intellectual deficiency exists on a continuum of progressive severity. As the deficiency increases, the ability to problem solve, exercise sound judgment, inhibit impulses, learn from experience, abstract, morally reason, cope with stress, withstand influence, etc. all decrease. Though it may be important for disability qualifications or *Atkins* determinations, the practical differences in functional capability displayed by individuals in the upper range of mild mental retardation and the lower ranges of borderline intelligence may be exceedingly subtle. Thus deficient intellectual functioning can have important implications for moral culpability even when not meeting diagnostic criteria for mental retardation.

38. Intellectual deficiency is characterized by an impaired capacity to understand and control one's actions. There is reduced ability to cope with and

function in the everyday world. This reduced ability can affect every dimension of functioning including:

Language
Communication
Memory
Attention
Ability to control impulsivity
Moral development
Self-concept
Self-perception
Suggestibility
Knowledge of basic information
General motivation

39. Deficient intellectual ability is associated with impaired logical reasoning, strategic thinking, and foresight. Accordingly, there is reduced ability to understand causation or predict consequences. Deficient cognitive ability is routinely associated with intellectual rigidity. This is likely to be demonstrated by:

1. Problems learning from mistakes and a pattern of persisting in behaviors even when they have proven counterproductive or unsuccessful.

2. Problems independently generating a sufficient range of behaviors from which to select an action appropriate to the situation – particularly under stress.

40. Deficient intellectual functioning limits the attainment of full moral reasoning ability. This is because moral reasoning develops incrementally and is dependent on intellectual ability and developmental level. Persons who are intellectually deficient have less ability to control their own

behavior. They are also more susceptible to being led and exploited by others.

Childhood onset alcohol and drug abuse and dependency:

41. In providing his history for the Presentence Investigation Report (PIR), Edward reported that he began consuming alcohol at age 3 or 4. Carmeta Albarus described Edward's report to her that he was given rum and Coke as a toddler by an older relative, who then urged Edward to dance. The PIR describes Edward's self-report that he had been drinking regularly since age 9 or 10. In the PIR, Edward is described as reporting that he began smoking marijuana at age 6-7 and then smoked regularly for the remainder of his childhood and adolescence. There is third party support for this self-report. Narlene, Edward's older sister, reported that she and her siblings routinely smoked marijuana when their parents were absent. Carmeta Albarus also observed that marijuana abuse is pervasive in Jamaica.

42. Edward's pattern of substance abuse has continued into his adulthood. In the PIR, Edward reported that he smoked marijuana daily if it were available. He described drinking 2-3 beers daily and a six-pack daily on weekends.

Implications of childhood onset alcohol and drug abuse and dependency:

Maltreatment:

43. The intentional dosing of a toddler with alcohol ingestion is a form of child abuse. Depending on amount of alcohol and frequency, this ingestion also has implications for impairing brain development. Routine marijuana abuse from age 6-7

years old and regular alcohol consumption from age 9-10 are reflective of negligent supervision by parent figures. Children that are being effectively supervised and monitored are unable to sustain such a pattern. This lack of supervision is a form of child neglect.

Impaired development:

44. Substance dependence in childhood and adolescence significantly disrupts and blocks the developmental tasks including growth in maturity and coping capabilities, adaptive socialization, and responsible achievement.

Self-medication and elevated dependence risk:

45. There are other implications as well. Among individuals with histories of developmental trauma, substance abuse can be conceptualized as an attempt at analgesic self-medication of trauma and associated affective and anxiety spectrum symptoms. Unfortunately, the earlier substance abuse is begun, the greater the likelihood of substance dependence in adulthood.

Substance abuse and violence:

46. The PIR described Edward's self-report of consuming marijuana on the day of the offense. It is silent, however, on whether Edward had ingested alcohol on that date. Alcohol does appear to have been implicated in one prior instance of violence for Edward. Ms. Billy Jo Swartz, who had had a romantic relationship with Edward, testified that their domestic altercation had a prelude of "And, so we started drinking and stuff and I left. And so in about four or five hours he come down where I was..." (page 2862/2353; lines 8-10).

47. Substance abuse and dependence may be implicated in criminally violent conduct in several ways. To explain, a number of research studies identify a frequent intersection of alcohol/substance abuse and criminal violence. Murdock et al. (1990) reviewed 26 studies from 11 countries involving 9,000 crimes: 62% of violent offenders were drinking at the time of the crime. Beck et al. (1993) found that 52% of homicide offenders were under the influence of alcohol and/or drugs at the time of the homicide. Gustafson (1993) reviewed experiments of alcohol-related aggressive responding, concluding: intoxication results in increased perception of threat, the predominance of frustration / threat increases aggression when intoxicated, intoxicated individuals are more responsive to peer pressure, the perceptual experience of intoxicated individuals results in a focus on frustration and threat cues to the exclusion of broader perceptions.

48. The presence of substance dependence, even apart from acute intoxication, is also a substantial risk factor for violence in the community. Research on incarcerated homicide offenders, collected and reported by the U.S. Department of Justice (Greenfeld, 1998), found that 32% of state prison inmates convicted of homicide had had a pattern of daily drinking. Swanson et al. (1990) reported on the interviews of 7000 community respondents in Durham and Los Angeles: alcohol abuse / dependence was associated with an 11-fold greater incidence of violent behavior (one year prevalence 2.28% vs. 23.62%). The risk of violent behavior with alcohol ingestion is increased among individuals with cognitive or neuropsychological impairment (Hoaken, Assaad, & Pihl, 1998).

Broad substance dependence effects:

49. In examining the effects of substance dependence and/or acute intoxication on the etiology of a criminally violent act, it is not a simple dichotomy of being either acutely intoxicated on one hand or completely unaffected on the other. Instead, there is a continuum of the extent to which substance dependence and intoxication undermine the quality of personality and cognitive processes, with associated resentment, projection of blame, brooding obsession, inappropriate emotional reactions, poor behavioral control, poor judgment, impaired capacity to consider alternatives, and poor planning. Thus it not necessary for someone to be staggeringly intoxicated before his judgment is impaired by substance abuse – particularly chronic substance abuse. This is part of the rationale of the random drug testing of individuals in critical occupations - even though they show no overt evidence of intoxication. In other words, substance abuse/dependence can significantly affect the quality of judgment and behavioral responses though the individual is still capable of purposeful behavior and may not overtly appear to be under the influence.

50. Further, substance dependence undermines the quality of judgment apart from episodes of intoxication. This is why recovery from substance dependence involves so much more than simply no longer abusing the substance. Rather Alcoholics Anonymous and other treatment efforts are typically necessary to restore adaptive perspectives regarding self and others, to develop healthy coping resources, to assume greater personal responsibility, and to establish psychological maturity. Thus as individuals in recovery from substance dependence

reflect on their period of active abuse, they describe not only the behaviors associated with acute intoxication, but also the "stinking thinking" that typified their broader life decisions and interpersonal behaviors.

Recurrent head injuries:

51. Carmeta Albarus obtained a history that Edward was repeatedly battered about the head by his father during childhood. She also obtained a report of Edward being struck in the head at age 12 with a golf club, resulting in loss of consciousness and a four-day admission to the Port Antonio Hospital.

Implications of recurrent head injuries:

52. Head trauma and other neuropsychological insults to the brain during childhood can have significant enduring impact on cognitive capacity, behavior, and developmental trajectory.

Scholarly perspectives on the effects of childhood head trauma:

53. Ryan, Lamarche, Barth, and Boll (1996) described some of the challenges in the adequate diagnosis and clinical appreciation of these injuries:

> Children's head injuries are also less likely than those of adults to be evaluated by a neuropsychologist. Consequently, their actual consequences are underappreciated (Boll, 1983). Absence of neuroradiologic evidence of structural tissue damage may be misinterpreted as absence of damage. In cases of acceleration/deceleration, rotation, or other mild closed head trauma, the associated shearing, tension, and compression commonly produce neurocognitive deficits and associated

> psychological and behavioral disruption that are not apparent on computerized tomography (CT) or magnetic resonance imaging (MRI). (Ryan et al., 1996; p. 128-129)

54. Ryan et al. described that the presentation of this damage may be both subtle and delayed in its impact:

> Although children with mild and moderate traumatic brain injury may return to adequate levels of measured academic achievement more quickly, this does not mean that there are no long-term problems. Does this measured competence always translate into classroom competence? Impairments in learning ability may preclude use of stored academic skill and result in poor current learning even with adequate background skills. Furthermore, fatigue and irritability may well result in academic difficulty, feelings of discouragement, and general loss of self-esteem, which may become as large a burden as the effects of the injury. (p. 127)
>
> In other words, a child injured at age 5 or 6 may appear neurologically normal, but fall behind classmates as they progress through the elementary grades. (p. 124)
>
> Complex neurocognitive behaviors subserved by the frontal lobes include reasoning, problem solving, planning, and execution of goal directed behaviors. Developmentally, these areas are thought not to reach full maturity until adolescence or early adulthood. Damage to these areas in early childhood may have far-reaching implications for eventual

recovery and functional adaptation that may not be manifested for years. This interaction between early frontal lobe damage and arrested or retarded development of higher cognitive functions could be termed "the sleeper effect" (Rourke, 1983; Rourke, Fisk, & Strang, 1986). (p. 123)

55. Ryan et al. (1996) additionally concluded:

Pediatric head trauma has reached a level of serious concern. This may be true for several reasons. First, although recovery of cognitive and intellectual functions may proceed well into the fifth year post-injury, deficits remain in comparison to their premorbid experiences and to their noninjured peers. Children with head injuries may, with varying degrees, lose the potential to learn. As their peers continue to develop and advance normally, the head-injured child may remain intellectually static, thereby experiencing a relative decline. In addition, pediatric head trauma is a significant future concern because the deficits children may exhibit later may be "hidden" on first inspection. In fact, impairments in frontal lobe functioning may not be detected until the developmental demands for independence and self-initiated academic, social, and vocational performance challenge the child. A confounding problem is the increased risk of further injury due to behavioral and psychological difficulties such as impulsivity, disinhibition, decreased concentration, and poor judgment....This point [need for research] takes on a special significance when one considers the hidden

> deficits and maturational challenges of these impaired children. (page 134)

56. Finally, Ryan et al. (1996) described that the prognosis following head trauma may be adversely affected by troubled family context. This has obvious implications for Edward given the problems occurring in his family system as a child. Ryan et al. described:

> Rutter (1981), in his review of the pediatric psychological difficulties following severe head trauma, indicated that there was a definite correlation between premorbid and post-injury problems...Significant disruption and compromise of central neuronal structure apparently resulted in exacerbation of preexisting psychological/psychiatric difficulties. A loss of cognitive function subsequent to head trauma only worsened the child's capacity to compensate for and effectively cope with the trauma (Begali, 1987. In addition, Rutter indicated that adverse psychosocial factors also influence eventual psychiatric outcome. The rate of psychiatric/behavioral disorders for head-injured children from psychosocially disadvantaged backgrounds was from 20 to 25%. Individuals from socioeconomic and family backgrounds that were not considered adverse, however, evidenced rates of less than 7%. (p. 119)

Relationship of head trauma and brain dysfunction with criminality and violence:

57. The presence of brain dysfunction is also a risk factor for multiple adverse outcomes which may

increase the likelihood of criminal conduct or violent offense. These adverse effects include academic frustration and failure, impulsivity, judgment deficits, emotional dyscontrol, and behavioral disturbance. Consistent with this observation, there is a growing body of psychological, psychiatric, and neurological literature which identifies that brain damage is present in disproportionately high incidence among violent offenders.

58. To briefly sample this literature, Lewis et al. (1986) in a study of 15 death row inmates identified that all 15 had histories of severe head injury. Langevin et al., (1987) found neuropsychological variables to be significant in one fifth to one quarter of violent offenders and found that 1 in 3 killers exhibited clinically significant neuropsychological impairment. Elliott (1987) stated: "Over the past twenty years it has become increasingly evident that overt and covert neurological and neuropsychological impairments are far more common in recurrently violent individuals than in non-violent population."

59. Martell (1992) in a study of 50 randomly selected mentally disordered offenders found at least one indicator of potential brain dysfunction in 84% of the subjects. In those subjects in which an organic brain disorder was diagnosed, 75% have been charged with murder, manslaughter, or attempted murder. The remaining 25% had been charged with violent sex offenses. Blake et al. (1995) reviewed the medical records of 31 individuals awaiting trial or sentencing for murder and found abnormal EEG's in 8 of 20 subjects, abnormal MRI's in 9 of 19, evidence of frontal lobe dysfunction in 64%, and evidence of temporal lobe dysfunction in 29% of the subjects.

These references are by no means exhaustive of the literature on this subject.

Recurrent absence of and estrangement from father:

60. From her interviews, Carmeta Albarus found that not only was Oswald recurrently absent from the home for six months to a year at a time, he was also punitive and rejecting of Edward when he was present.

Implications of absence of and estrangement from father:

61. A boy's relationship with his father is a critically important formative influence. The father provides important affirmation of the boy's own worth, represents a model of manhood, and is an important source of structure and limits during adolescence. Oswald's responses in all three of these arenas were deficient. Most problematic, Oswald was an absent father – alternatingly either physically absent or emotionally absent. Though more narrowly based on families where the father is absent altogether, literature addressing the developmental risks of father absence provides some illumination of the importance of this parent-child relationship. It also demonstrates risks associated with the absence of this positive role in a boy's life, including delinquency, criminal activity, and murder. Examples of these findings and the research citing them are listed below:

- The low supervision of adolescents frequently found in father-absent homes was more the cause of delinquency than poverty (Sampson & Laub, 1994).
- Father-absent adolescents are more likely to commit a school crime (Jenkins, 1995).

- The likelihood that a young male will engage in criminal activity doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single-parent families (Hill & O'Neil, 1993).
- 70% of the juveniles in state reform institutions grew up in single- or no-parent situations (Beck, Kline, & Greenfield, 1988).
- 72% of adolescent murderers grew up without fathers (Cornell, D. et. al., 1987).
- Children who grow up in a father-absent home are at a dramatically greater risk of drug and alcohol abuse, mental illness, suicide, poor educational performance, teen pregnancy and criminality (U.S. Department of Health and Human Services, 1993).
- An unsatisfactory relationship with a father who did not provide his son with affirmation and regard was one of the factors identified by the FBI's Behavioral Science Unit as they investigated the etiology of a particular type of homicide (Ressler, Douglas, & Burgess, 1988).

62. Importantly, a boy's relationship with his father forms an important template for viewing and responding to authority figures. The pathological relationship that Edward described with his brutal and rejecting father provides some insight as to why he might respond badly to police contacts. It would certainly have preempted the argument of the Commonwealth:

> Mr. Thompson: The relationship that Edward Bell has to authority and law enforcement has absolutely not one shred of mitigation to it. (page 2937/2438, lines 21-23).

Physical abuse:

63. Edward described to Carmeta Albarus having suffered extensive physical abuse at the hands of his father. This brutality included being beaten with electrical cords, belts, wood planks, and brooms. Edward reported scars on his body from these beatings, most from the belt buckle leaving cuts. He displayed a scar on his back to Ms. Albarus, attributing it to one of the beatings. He described his father as routinely striking him on the head when he was slow to respond or learn. He recalled being awakened in the middle of the night by blows to the head for some offense that had occurred earlier in the day. Edward also described his father instructing the Edward's sisters to keep Edward locked in a room or that Edward should be deprived of food.

Implications of physical abuse:

64. The American Psychological Association Presidential Task Force on Violence and the Family (1996) concluded that maltreated children may show a variety of initial and long-term psychological, emotional, physical, and cognitive effects including low self esteem, depression, anger, exaggerated fears, suicidal feelings, poor concentration, eating disorders, excessive compliance, regressive behavior, health problems, withdrawal, poor peer relations, acting out, anxiety disorders, sleep disturbance, lack of trust, secretive behavior, excessively rebellious behavior, and drug or alcohol problems. The task force further identified the following broad conclusions:

1. Child abuse and neglect can seriously affect a person's physical and intellectual

development and can lead to difficulty in self control.

2. Abused and not treated children are more likely than non-abused children to be arrested for delinquency, adult criminal behavior, and violent criminal behavior.

3. When abused children are not given appropriate treatment for the effects of the abuse, the lifetime cost to society for an abused child is very high.

Relationship of childhood trauma to psychological, behavioral, and relationship pathology:

65. Experienced and/or observed physical abuse as well as other forms of childhood trauma are associated with substantial mental health morbidity - frequently taking the form of Posttraumatic Stress Disorder (PTSD), depression, relationship disturbances, personality disorder, and/or antisocial behavior. Traumatic experience in childhood from abuse or other insults can result in impairments of perception, judgment and behavior; vulnerability to poor role models and negative influences; chronic self-defeating behavior; chronic agitation; poor problem-solving skills; an inability to predict the consequences of one's behavior accurately; an inability to modulate or understand one's emotions; an inability to use emotions as guides for appropriate action; an inability to assign language to emotions; a constant state of internal and external fear; a foreshortened sense of future; chronic self-medication and substance addiction; a fragmented sense of self; an inability to successfully achieve developmental milestones; pervasive low self-esteem; a chronic and inescapable sense of shame and

worthlessness; and behavioral misconduct and criminal conduct (Pynoos, Steinberg, & Goenjian, 1996; Schwarz & Perry, 1994; Terr 1991; Tomb, 1994). There is evidence that these symptoms and disorders stem from trauma initiated changes in brain structure and metabolism that can be persistent. Chronic victimization can also result in survival responses of attempting to emulate the toughness of those that perpetrated the victimization (i.e. identification with the aggressor).

Relationship of childhood trauma to criminal activity and violence:

66. The relationship of childhood maltreatment and family violence to adolescent and adult criminal activity and violence is demonstrated in three large-scale studies.

67. Widom (2000) reported on the 25-30 year follow-up of 676 children identified by the court (1967-1971) as abused or neglected before the age of 11, and 520 matched controls. The maltreated children in this study were approximately 25% more likely to have an adult criminal arrest and/or an adult arrest for a violent crime. Similar increases in risk of criminal violence were reported by Kelly, Thornberry, and Smith (1997), based on the findings of the Rochester Youth Development Study. More recent research published by the U.S. Department of Justice (English, Widom, & Brandford, 2001) reported that abused and neglected children were 4.8 times more likely to be arrested as a juvenile, 2 times more likely to be arrested as an adult, and 3.1 times more likely to arrested for a violent crime than matched controls.

68. It is important to note that physical abuse of a child, or other dysfunctional family processes, are not rendered benign because they occur at high frequency in a given culture. Trauma is independent of skin color or nationality. A high prevalence of shared dysfunction and trauma may act to increase the negative outcomes by reducing community and family resources, delaying intervention, and increasing associations with damaged peers. It is also not uncommon for some siblings or family members to minimize or "normalize" child abuse, domestic violence, and dysfunctional family processes. This may be a function of selective memory, taboos against acknowledging dysfunctional family processes, or beliefs in certain cultures that some forms of pathological behavior are normative and therefore benign. It is not surprising, then, that though Edward's siblings describe beatings, they do not regard this as abusive. Similarly, they do not describe Oswald's domestic abuse of Rosaline though this spousal violence is confirmed by one of Rosaline's sisters.

Domestic violence and corruptive relationship modeling of parents:

69. Edward described to Carmeta Albarus that Oswald was physically violent with Rosaline. He described that his father would push or slap his mother if she tried to intervene in his father's beatings of him. Johanna Davis, maternal aunt, reported that Oswald would shove or rough up Rosaline on occasion. Edward described that Rosaline had lost teeth from beatings by Oswald. Edward reported that some to these episodes of abuse were triggered by Rosaline's complaints of the

attention that Oswald would receive from other women on his return to Jamaica.

Implications of observed domestic violence:

70. Children who are exposed to parental violence, even if they are not targets of this violence, have reactions similar to those of children exposed to other forms of child maltreatment (American Psychological Association Presidential Task Force on Violence and the Family, 1996). More specifically, the observation of violence directed towards others in the family is associated with an equivalent emotional distress, psychological disorder, and adverse outcome as the direct experience of physical abuse.

71. Thornberry (1994), in research sponsored by the U.S. Department of Justice, described data from the Rochester Youth Development Study regarding the association of family violence exposure and subsequent rates of serious youth violence from these families. Three types of family violence exposure were studied: spouse abuse, abuse of children, climate of violence and hostility. Among children without a history of family violence, the rate of serious youth violence was 38%. If one type of family violence was present, the rate of serious youth violence was 60%, increasing to 73% and 78% with an exposure history to two and three types of family violence respectively. Kitzmann et al. (2003), in a meta-analysis of 118 studies concluded that about two-thirds of children exposed to parental violence were faring more poorly than the average child who was not exposed to parental violence.

72. The domestic violence Edward witnessed as his father beat his mother is also an important developmental context for the jury to consider in

weighing the implications and origins of Edward's alleged violence in his own domestic relationships (see testimony of Billy Jo Swartz).

Summary regarding mitigation and its strategic implications

73. These multiple significant mitigation themes both separately and, more importantly, collectively provide some explanation of Edward Bell's alleged involvement in adolescent misconduct, substance dependence, criminal activity, and the charged murder. The cumulative and interactive effects the adverse developmental factors experienced by Edward represent a compelling developmental narrative with a nexus to the capital offense. The presentation of these damaging developmental factors would not have been inconsistent with the available testimony of many contemporaries of Edward in Jamaica who described him as gentle, nonviolent, law-abiding, and hardworking. In fact, Edward appears to have displayed some resilience in the face of the adverse developmental factors that impinged on him. Even acknowledging alleged instances of domestic violence, the capital offense appears to represent an anomaly in Edward's behavior pattern in terms of an assault on either a stranger or law enforcement officer. Additionally, the presentation of these damaging developmental factors need not have been a "two-edged" sword, i.e. mitigation on one hand but increasing risk of violence in prison on the other. The developmental factors identified in the above discussion increase the risk of criminality and violence in the *community*. There is no research demonstrating that such developmental factors are predictive of serious violence in *prison*. The failure of these

factors to predict violence in prison is a function of their prevalence. Not surprisingly, the presence of developmental factors for criminality and violence such as those specified by DOJ and other scholarly literature elaborated are quite common among prison inmates. Any factor that is highly prevalent in a given group (e.g., damaging developmental factors among prison inmates) will fail to predict the rare event (e.g., serious institutional violence).

Section II: Violence Risk Assessment

74. Beyond arguing Mr. Bell's non-violent adjustment to jail pre-trial and the nature of high security confinement that Mr. Bell would face in prison, the defense offered nothing to rebut the Commonwealth's assertion:

> Mr. Thompson: Considering the history and background, that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. (page 2922/2413; lines 10-13)

75. The defense offered the above very limited arguments, but *no* testimony or evidence, regarding the methodology of reliable violence risk assessment and/or the associated data that could be applied to particularize Mr. Bell's likelihood of violence confined for life in the Virginia Department of Correction.

76. This failure did not stem from a lack of scholarly literature or correctional data in January 2001 that was specific to violence risk assessments at capital sentencing. The broad scientific acceptance of the risk assessment methodology outlined below is demonstrated by publications that

have passed peer review in major forensic psychology journals and edited texts (a sample of these that I have co-authored are attached at Appendix A). The acceptance of this scholarship is also demonstrated by my being awarded the *2005 Texas Psychological Association Award for Outstanding Contribution to Science* and the *2006 American Psychological Association Award for Distinguished Contribution to Research in Public Policy* – both of which were substantially in recognition of my research regarding violence risk assessment at capital sentencing. It should also be noted that peer-reviewed research findings that I have co-authored, as well as those authored by other scholars since 2001, continue to be consistent with the methodology and fundamental conclusions regarding violence risk assessment at capital sentencing detailed below.

Individualization and group statistical data

77. In order to scientifically address the question of the likelihood that Mr. Bell will seriously assault a staff member or another inmate during a capital life term, knowledge and application of the relevant group statistical data is essential. Simply stated, there is no *individualized* assessment of a particular person that does not rest on group data of one sort or another. Appraisals and predictions regarding the behavior of a given individual rely on personal or vicarious experience with the behavior of others (the group). Personal experience with groups of people, however, is limited in number and scope, as well as subject to ignorance, self-fulfilling prophesies, prejudice, misinterpretation, and distortion.

78. Psychology exists as a science because it provides a database regarding the behavior of groups

of individuals that is systematically and reliably obtained using the scientific method. All scientifically derived (as distinct from personal experiential) expert knowledge in psychology consists of published observations and research on various groups of animals and individuals. Scientific expertise in psychology then consists *solely* of knowledge about this group-derived data. Scientific evaluation, treatment, or behavioral prediction regarding a specific person relies on these collective observations and research data from a specified context.

79. For example, when a particular patient is diagnosed as being clinically depressed, this diagnosis is based on a group of individuals who displayed a similar constellation of symptoms. The prognosis and treatment of the individual patient stems from the experience of the representative patient group. Even though there are always ways in which the individual varies from the group, the group experience remains relevant because important characteristics are shared. Similarly, group statistical data form the fundamental scientific underpinning of the practice of medicine and pharmacology. For example, the prescription of an antibiotic for a given infection relies on the clinical trials with this drug (i.e. the statistical response to this medication by a group of patients with a similar infection). Expertise in diagnosis and treatment in medicine essentially distills to knowledge of numerous base rates of clinical relevance. In addition to the sciences of psychology and medicine, the use of group statistical techniques in evaluating risks of all types has had a

longstanding role as the principal methodology in the insurance industry.

80. That group outcomes are relevant to individual behavior is illustrated in the greater confidence we give to a study involving 10,000 subjects than one involving 100 subjects. The larger the group studied, the more confident we are that the individualized applications are sound. As consistent findings are obtained from research on multiple groups that share the characteristic under consideration, our confidence in the application to the individual increases further.

81. Violence risk assessment, a particular area of research and knowledge within psychology, also fundamentally relies on the accumulation of group data that are then applied to a given individual. At the point that group data are applied to a particular person, the methodology becomes individualized. Regardless of whether the violence risk assessment method is clinical (interview/testing), anamnestic (past behavioral pattern in a similar context), or explicitly group statistical; conclusions offered by an expert about a particular individual are purported to be reasonably and reliably inferred from group data. Similarly, inferences regarding violence risk from history, personality characteristics, psychological testing profiles, and diagnoses all rely on group statistical data as their scientific foundation.

82. The base rate is the statistical prevalence of a particular behavior over a set period of time. It is the fundamental group statistic in risk assessment and is considered to be the single most important piece of data necessary in making an accurate risk estimate (Monahan, 1981; Webster et al., 1994).

83. Base rate data is incorporated in multiple risk assessment models described in the research, with empirically validated factors being employed to conservatively individualize this base rate. The summary of various risk assessment models which follows is not intended to be exhaustive, but will serve to illustrate specific variations around a generally consistent theme of individualizing group base rates.

84. Monahan (1981) described approaching the risk assessment task with a combination of:

1. actuarial methods.
2. dispositional/interactional/contextual approaches.

85. Monahan recommended beginning with a base rate. This base rate or actuarial estimate would then be conservatively individualized by examining individually specific dispositional, interactional, and contextual information.

86. Morris and Miller (1985) described risk assessments of future violence as being of three types:

1. Anamnestic (using how the individual behaved in the past to estimate behavior in similar circumstances).
2. Actuarial (using how people like the defendant have behaved to estimate how the defendant will behave).
3. Clinical (using life experience, training, knowledge of mental illness, observations, and diagnosis to estimate future behavior).

87. Anamnestic (i.e., past behavior pattern) reliability is dependent on a sufficiently established

pattern and continuing close similarity of context. Actuarial techniques require relevantly applicable group outcome data. Clinical assessments rely on traditional methods of interview, testing, inference, and diagnosis. Morris and Miller asserted that actuarial and anamnestic approaches are more reliable than clinical approaches, which they described may add little to the accuracy of actuarial or anamnestic assessments.

88. Hall (1987) proposed varying formulas for risk assessment depending on whether long-range, short-term, or imminent forecasting of violence was being attempted:

1. Long-range violence is best estimated by the base rate of violence in the group to which the individual belongs.

2. Short-term (next several months) violence potential is a function of the interaction of historical variables (nature of violent exposure, experience, and behavior), current operating variables (long-term disposition and short-term triggers), opportunity variables, and inhibitory variables.

3. Imminent (next several days) violence is a function of perpetrator variables, contextual stimuli, victim characteristics, and inhibitory factors.

89. Serin and Amos (1995) proposed a decision tree for the assessment of dangerousness that consisted of four sequential steps:

1. Derive a group base rate estimate from relevant group demographic and dispositional factors.

2. Consider clinical information regarding past use of violence, disinhibitors, and persistence of antisocial behavior in conservatively revising the group base rate estimate to an individual base rate estimate.

3. Evaluate what risk management variables and what contextual factors might be modified to reduce the likelihood of violence.

4. Establish a final revised estimate of violence potential.

90. Failure to anchor individual violence risk assessments to the base rate of violence in the estimated group is a common fundamental error (Monahan, 1981, 1996; Smith, 1993). As Smith (1993) stated "the most common significant error made by clinicians in the prediction of violent behavior relates to ignorance of information surrounding the statistical base rate of violence in the population in question" (p. 539). Similarly, risk assessments at capital sentencing may err by inappropriately emphasizing predictive ramifications of the instant offense or limited case information while neglecting base rates. Without a base rate anchor as a comparative reference point, individual risk estimates at capital sentencing may be little more than speculation (Cunningham & Reidy, 1999).

Base rates of prison violence among capital murderers:

91. The post conviction incidence (base rate) of serious prison violence of capital offenders is fundamental to the estimated risk these offenders

represent while incarcerated. Prison misconduct data regarding capital offenders and murderers is available from a number of different departments of correction. A number of rationales support generalizing from these studies to capital offenders in other correctional settings including the Virginia Department of Corrections:

1. The underlying capital offenses in past samples and current offenders were sufficiently aggravated (in comparison to other capital eligible offenses) that a death sentence was sought and returned.

2. There is little plausible reason to believe that defendants committing capital murder in other jurisdictions are different in some essential way from capital offenders tried in Virginia courts.

3. Fundamental aspects of state prison incarceration have a high degree of similarity over time and across corrections departments - particularly during the past 30 years. Correction departments belong to common associations and accrediting organizations, disseminate statistical experience and research findings with each other, and are guided by common judicial determinations.

4. Despite the diversity of settings and time periods, there is broad similarity in the research results from study to study - reflecting a robust finding.

5. There is no research or other authority demonstrating that these base rate studies cannot be reliably generalized to capital

defendants across correctional jurisdictions.

92. To summarize, these studies produce highly consistent data regarding the violence rate of these offenders regardless of the victim or weapon features of the murder, specific death penalty statute, decade of follow-up, particular state department of corrections, or sentence of the convicted murderer (former death row, LWOP, LWP). In other words, none of these "unique case" variables influenced the outcome rate of prison violence for the broad category of murderer sentenced to at least decades of confinement. Only with the extraordinary sample size of the Sorensen and Pilgrim (2000) study of Texas murderers were a limited number of demographic/offense characteristics demonstrated to raise or lower the projected risk of prison violence. There is neither evidence nor plausible rationale that such consistent and robust findings would not generalize to capital offenders in the Virginia Department of Correction.

93. In the only study providing both capital offender and broad comparative base rates of prison violence, Marquart, Ekland-Olson, and Sorensen (1989) examined the institutional disciplinary records (1974-1988) of 92 Texas capital murderers convicted post 1973 who were released from death row by commutation to life sentence, retrial and sentence to prison, or case dismissal. The prison experience of these commuted death penalty inmates was compared to a group of Texas life sentence capital murderers, as well as the prison behavior of inmates "system wide" in the Texas Department of Corrections, and inmates at a Texas high security

prison facility. The prior criminal histories and homicide characteristics of the capital murderers reflected a broad range of past arrests and homicide contexts.

94. Of greatest comparative significance is the review of total infractions on a yearly average per 100 inmates. This represents an annual base rate or estimated experience per 100 inmates per year as displayed in Figure 1.

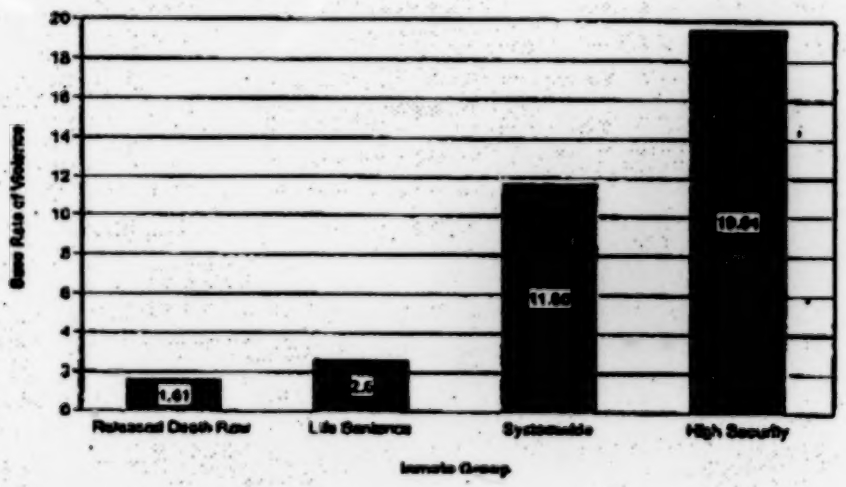


Figure 1. Reported serious violent prison rule violations: Average number of violations per 100 inmates per year (Homicide, assault with weapon, sexual abuse by threat, striking officer)

95. It will be noted that the "release from death row" base rate of 1.61 (i.e. 1.61 violent rule infractions per 100 inmates per year) is less than that of the "life sentence" inmates of 2.60, is 1/7 of the "systemwide" base rate of 11.66 and 1/12 that of the high security prison. These base rates provide both a specific and comparative framework for the risk of serious violent rule violations. An argument could be made that much prison violence goes

unreported and thus the statistics are unreliable. This argument has several fallacies: The issue of unreported offenses would apply to all categories of offenders; the offense least likely to go unreported (striking of an officer) occurred at a low rate for both capital murder groups and displayed a similar proportion across groups as did the total infractions.

96. Additionally, Marquart et al. noted that approximately 90% of both the former death row inmates and the life sentence control cohorts who were still incarcerated held trustee status. A minority of death row inmates exhibited persistent serious disciplinary problems. Marquart et al. indicated that eight of the former death row prisoners and six of the control life sentence group were identified as prison gang members and confined indefinitely in administrative segregation. The prison context of these problematic inmates was modified by increased restriction, supervision, and isolation so that any opportunity they might have to be assaultively aggressive was almost entirely negated, likely resulting in a negligible subsequent violence base rate. Thus the prison system does appear to have appropriate mechanisms for the virtual complete restriction of inmates who require this degree of control.

97. Quite similar base rate data emerge from other retrospective tracking studies of commuted capital offenders. Marquart and Sorensen (1989) reported on the institutional behavior of 533 capital offender former death row inmates nationwide whose sentences were commuted as a result of the Furman v. Georgia (1972) decision, and whose disciplinary behavior was tracked across the

following 15 years. The associated base rates are illustrated in Figure 2.

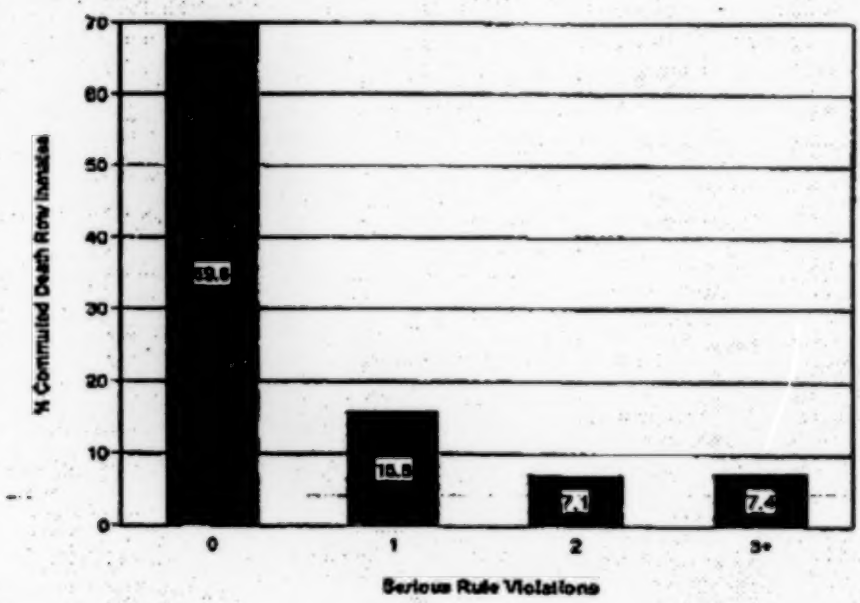


Figure 2. Serious prison rule violations committed by death row inmates over 15 years (Homicide, aggravated assault, sexual attack, escape, riot, work strike)

98. More than half of the total serious rule violations were committed by a small group of chronic offenders (7.4%). Marquart and Sorensen concluded, "These data demonstrate, at least among these violators, that most serious infractions were one time events or situations. In short, most of the Furman inmates were not violent menaces to the institutional order" (p. 20).

99. Marquart and Sorensen (1988) studied the institutional behavior of 47 capital offender former death row inmates in Texas whose sentences were commuted following the Furman decision in 1972. Across a 13 year period of confinement in the general prison population, these 47 former death row

inmates committed 3 weapons related offenses. Additionally there were two incidents of striking a guard. Of the Furman group, 93% committed no assaultive weapons offenses while incarcerated in the Texas Department of Corrections.

100. Marquart and Sorensen (1989) cited Wagner (1988) who conducted an extensive analysis of the prison behavior of 100 commuted capital offenders from 1924 to 1971 in Texas. He found that 80 commutees (80%) did not commit any serious prison rule violations such as murder, aggravated assault, sex by force, striking a guard, or escape. Three of the commuted capital offenders (4%) killed 4 fellow inmates.

101. Earlier, Bedau (1964) found no allegations of unmanageable behavior during incarceration among 55 New Jersey capital offenders who had been released from death row between 1907 and 1960 and were serving life imprisonment terms.

102. Limited base rate data regarding prison violence of non-capital murderers are available. Corollary but unspecified base rate perspective of the prison behavior of murderers in general was provided by Flanagan (1980) who identified murderers as being "settled" prisoners who are infrequently involved in violent behavior within the institution.

103. It is important to note that the sentence a capital defendant receives does not appear to significantly affect subsequent base rates of violence while incarcerated. Sorensen and Wrinkle (1996) analyzed the records of two groups of first degree murderers including 93 death sentence inmates and 323 life-without-parole inmates, both housed in

Missouri general prison population. These two groups were contrasted with 232 life-with-parole second degree murderers. The three groups were not significantly different in their rates of assaultive rule infractions which had a combined prevalence rate of 20% (approximately 29% of these assaults were classified as minor). There were 8 murder/manslaughter's committed by the combined groups across the 1977-1992 period of disciplinary record review, yielding a prevalence rate of 1.2% (8/648). The lack of significant difference in the prevalence of assaultive behavior among the three sentencing groups provides support for the generalization of base rate data regarding prison violence to capital murder inmates regardless of type of sentence.

104. This finding mirrors the similar violent rule infraction incidence of the two capital inmate groups in the Marquart and colleagues Texas comparative study. Similarly, research on a decade of inmate violent misconduct in a maximum security prison (Cunningham, Sorensen, & Reidy, 2005) demonstrated that inmates serving life-without-parole were only about half as likely to commit a violent misconduct as the parole eligible inmates they were incarcerated with.

105. To summarize, there is a growing body of studies demonstrating that the majority of convicted murders and capital offenders (whether sentenced to death, life, or given relief from their death sentences) never engage in serious assaults (Cunningham & Reidy, 1998; Cunningham & Reidy, 1999; Cunningham, Reidy, & Sorensen, 2005; Cunningham, Sorensen, & Reidy, 2005; Cunningham & Sorensen, in press; Edens et al., 2005; Marquart,

Ekland-Olson, & Sorensen, 1989; Marquart & Sorensen, 1989; Marquart, Ekland-Olson, & Sorensen, 1994; Reidy, Cunningham, & Sorensen, 2001; Sorensen & Pilgrim, 2000; Sorensen & Wrinkle, 1996). These findings are illustrative of the counter-intuitive nature of the actual findings regarding prison violence.

106. Because these findings are both counter-intuitive and outside of a capital jury's expected experience and knowledge, it is essential that the risk assessment and discussion of the underlying group statistical data be detailed and transparent so that their own determination of this issue will be fully informed.

Group data regarding aging and prison misconduct:

107. Prison disciplinary problems also decrease as the inmates get older, regardless of how the inmates are treated (Alexander & Austin, 1992). Hirschi and Gottfredson (1989) cited 1975 New York prison infraction base rates which were ten-fold greater for inmates in their twenties than inmates over age 60. In a study of death sentenced and life-without-parole inmates, Sorensen and Wrinkle (1996) reported that rates of infractions were higher for younger inmates, tended to rise during the initial period of confinement, and then decreased over time. Flanagan (1980) identified lower prevalences of prison misconduct among older cohorts of inmates. Additionally, Flanagan reported that inmates facing long-term sentences had lower rates of prison misconduct than age matched inmates with short-term sentences, though the type of misconduct of the long-term inmates tended to be more serious. Thus, progressive aging across a prison sentence may be reflected in a decreasing violence base rate over

time. Flanagan's data also demonstrates that the lower rates of prison misconduct by age are stable even among offenders who committed their violent offenses of conviction at an older age. Mr. Bell being age 36 in January 2001 was a significant factor pointing to a markedly lower likelihood of misconduct and violent misconduct in prison. This lower likelihood would further decline as he aged in prison.

Commonwealth endorsement of group data:

108. When alleging future dangerousness in capital cases, the Commonwealth has routinely asserted that certain elements of the offense and/or the defendant's prior history are associated with his *individual* risk of violence in prison. In this assertion the Commonwealth is necessarily, if perhaps unwittingly, endorsing the proposition that *group* pattern principles and data regarding continuity of conduct apply to a particular defendant. To explain, a violence risk assessment based on a past behavior pattern such as this relies on assumptions that people as a *group* maintain similar behaviors over varying periods of time. Further it assumes that the *groups* of individuals who have had a pattern of violent and/or criminal activity in the past have a much higher continuing incidence (*base rate*) of those misdeeds – even in prison. These *group* assumptions and experiences form the basis for an *individualized* appraisal of the violence risk of a particular defendant. Again the individual appraisal is not made in a vacuum; rather the pattern of the individual is analyzed in light of the pattern history of the group.

Problems in Inferring Prison Misconduct from Community Criminality and Violence

109. Problematic for the State's assertion that a pattern of behavior in the community will be continued in prison, is that there is little research data to support it. Quite the contrary, studies sponsored by the U.S. Justice Department (Alexander & Austin, 1992; National Institute of Corrections, 1992) have concluded:

1. Past community violence is not strongly or consistently associated with prison violence.
2. Current offense, prior convictions, and escape history are only weakly associated with prison misconduct.
3. Severity of offense is not a good predictor of prison adjustment.

110. The explanation for this disconnect between community violence and prison violence is that much violence is a product of the interaction or convergence of situational factors, interpersonal relationships and other contributors, as well as individual violence proclivity (Cunningham & Reidy, 1999; Shah, 1978; Monahan, 1981, 1996). Hall (1987) conceptualized the likelihood of violence as involving the interaction of the individual with environmental factors at a certain time, place and setting. Hall asserted: "Individual persons are never dangerous in toto" (p.10). The convergence of these factors that resulted in the capital offense may well not be replicated in prison. There is ample research to support this proposition.

111. To illustrate this research, Flanagan (1980) identified that inmates facing more that five years of confinement (47% of whom were murderers) had

lower rates of disciplinary infractions than did short-term inmates. In other words, inmates convicted of more serious offenses and facing longer prison sentences displayed better prison adjustment than short-term, less serious offenders. Disciplinary offenses of any sort among long-term inmates in this study ranged from approximately .5 to 1.5 per inmate annually depending on the age of the inmate at initial incarceration. Only 11.8% of these infrequent disciplinary write-ups were for fighting or some form of physical assault. Flanagan hypothesized that long-term inmates adopt a perspective regarding doing time that promotes adaptation.

112. Similar counter-intuitive findings were reported by the U.S. Bureau of Justice Statistics (1986), as inmates convicted of violent offenses had lower rates of prison disciplinary infractions than property offenders. Consistent with the above, Cooper & Wemer (1990) found that severity of the offense of conviction did not predict violent infractions in the first six months of federal prison confinement, despite expectations of prison caseworkers and psychologists that this was an important predictive factor.

113. Recent data, obviously not available in 2001, confirms this pre-2001 research. Analysis of disciplinary data from the entire Florida Department of Corrections on over 50,000 inmates incarcerated for the entirety of 2003 revealed that inmates who had been convicted of first degree murder were less likely to have general disciplinary infractions and had equivalent rates of assault as compared to property offenders and all inmates (Sorensen & Cunningham, in preparation). In

another study of 2,500 inmates over an 11-year period, inmates serving life-without-parole sentences were half as likely to be involved in assaultive misconduct as the parole eligible offenders they shared confinement with in the same correctional facility (Cunningham, Sorensen, & Reidy, 2005). As was previously described, comparison of capital offenders with general population inmates (Marquart et. al., 1989) found that the capital offenders had lower rates of violent misconduct than either other high security or general population inmates.

Particularization of group data to Edward Bell:

114. The group statistical methodology and illustrative data presented above regarding the violence risk assessment of capital defendants serve as anchoring points in the assessment – and will be particularized to Edward Bell based on demographic features, adjustment to prior incarceration, offense characteristics, and other factors. Utilizing studies of death-commuted and life-sentenced capital offenders as anchors regarding the probability of a serious act of prison violence from a capital offender, there is a 20-30% likelihood of a capital offender in the general prison population committing an act of assautive violence at some time across his capital prison term. There is an approximately 8-10% likelihood that a capital offender would present a more chronic violence problem. Applying group statistical data from an exceptionally large recent study of assaultive conduct by convicted murderers in state prison, an offender matching the offense characteristics, demographic feature, and incarceration history of Mr. Bell would have the following probabilities of serious institutional

violence across a capital life term: 2% any serious assault, <1% aggravated assault on staff, and <.2% homicide of an inmate (based on Sorensen & Pilgrim, 2000). The likelihood of homicide of a Virginia DOC staff member is estimated at 1 per 1,000,000 inmates annually.

115. In further particularizing a group statistical risk estimate regarding serious institutional violence by Mr. Bell relative to the group rates, his age, nonviolent adjustment to pre-trial jail confinement, and history of community employment would serve to reduce his risk somewhat relative to the group rates. It should also be noted that the substance dependence that Mr. Bell sustained in the community and that potentially contributed to his violence in the community were unlikely to be replicated in prison where close observation and random drug screens are normative.

116. The jury was advised that Mr. Bell had not engaged in actual violence in jail pre-trial. This was in a context of testimony regarding threats against correctional personnel by Mr. Bell. The threats against correctional staff are obviously disturbing and an appropriate focus of both disciplinary response and elevated security. Such threats, however, are not synonymous with violence or imminent violence. Threats are made in a correctional setting for a variety of reasons besides a pending assault. These include puffing in front of other inmates for status or to seem more hardened as an inmate to avoid victimization.

117. Group data also informs interpretation of Mr. Bell's belligerent responses to correctional staff. More specifically, antipathy of inmates toward staff

is common if not ubiquitous in a correctional setting. In spite of this antipathy, serious violence against staff in state prisons nationwide is remarkably low. The rate of inmate on staff homicide in state prisons nationwide is extraordinarily remote - approximately 1 per million inmates per year. The jury did not have the benefit of these perspectives in weighing the risk implications of these threats or the capital offense being directed against a police officer.

Effect of preventive interventions on the risk assessment:

118. As risk of violence is always a function of context (for discussion of risk management in risk assessment see Heibrun, 1997, Heilbrun et al., 2000), the above estimates of the risk of serious violence could be markedly reduced by ultra-secure confinement such as that available in Red Onion. Security measures at this level of custody are quite effective, as demonstrated by the associated low rates of serious violence in a super-maximum confinement context.

Probable error in the absence of scientific methodology and data:

119. In the absence of detailed testimony regarding group statistic methodology and data, ultimately particularized to the specific capital defendant, the jury's determination of this issue is subject to grave error for the following reasons:

a. Individuals undertaking violence risk assessment are likely to commit a number of fundamental errors unless guided by reliable scientific methodology and data. These errors more often result in an overestimation of violence risk. The jury is unlikely to have knowledge of this

methodology and research data unless informed by expert testimony.

b. A capital jury's familiarity with the heinousness of the capital offense and knowledge of other aggravating factors or acts are likely in many instances to result in a perception of high future violence risk in prison that is not justified by research.

c. The combination of these factors is likely to result in a capital sentencing jury that is strongly biased toward overestimation of violence risk when scientifically grounded expert testimony is excluded.

d. In the absence of expert testimony, a capital jury has no mechanism to understand or incorporate base rate data, appreciate the importance of context, avoid illusory correlation, maintain skepticism of clinical methods, understand the implications of Antisocial Personality Disorder or related characterizations, incorporate the effects of aging, reliably evaluate patterns of behavior, factor in preventive measures, acquire the broad information relevant to violence risk considerations, appreciate the probabilistic nature of their task, or critically evaluate the arguments of the Commonwealth or the defense.

e. The scientific methodology and data relevant to violence risk assessment of capital offenders is based on multiple independent research studies, has been subjected to peer-review, articulates an error rate through the range of probabilities expressed, and is

generally accepted in the violence risk assessment scientific community. The confinement options available in the Virginia Department of Correction are detailed in official documents.

f. A capital jury is at best almost certain to be ignorant of rates of prison violence, inmate demographics and criminal histories, and prison confinement options and security procedures. At worst a capital jury comes to capital sentencing risk assessment holding assumptions regarding future dangerousness that are false. Such false assumptions spring from intuitive but erroneous beliefs. It must be emphasized that much of the research data on the violence risk assessment of prison inmates is counter-intuitive.

120. Data was available in 2001 demonstrating that the above sources of error are not simply theoretical. Retrospective review of the prison disciplinary records of the sample of the future danger-predicted, former death-sentenced inmates in Texas, following their transfer to the general prison population, provides a measure of the predictive accuracy of their capital juries (Marquart et al., 1989). If the capital juries had been contemplating serious institutional violence (i.e., inmate aggravated assaults with a weapon, sexual abuse of an inmate by threat, and violence against officers) in making an affirmative determination regarding Special Issue 2, they were wrong 90% of the time; and if contemplating a homicide were wrong 99% of the time. Admittedly, these juries were not *always* wrong. When "probability" is defined as "any

possibility," however, the issue loses any particularizing significance. There is "some possibility" in every case.

121. Marquart and Sorensen found that there were not significant differences in the elements of capital murder, weapon choice, relationship to victim, prior criminal histories, or other discernible characteristics of those cases the capital juries answered "yes" as opposed to "no" on Special Issue 2 (i.e., whether there is a probability of acts of criminal violence...). This suggests that the associated capital juries were responding to the same offender background and offense circumstances to reach diametrically opposed risk conclusions.

122. Avoidance of fundamental errors in violence risk assessment at capital sentencing requires the testimony of an expert to inform the jury of scientifically sound methodology and empirical data. Particularly when accompanied by demonstrative exhibits that assist the jury's understanding and retention, testimony detailing violence risk assessment methodology and empirical data can be presented in a clear, organized, logical fashion that neither confuses nor misleads the jury.

Respectfully submitted,

/s/ Mark D. Cunningham

Mark D. Cunningham, PhD.
Clinical and Forensic Psychologist
Board Certified in Forensic Psychology
American Board of Professional Psychology

Dated this 5th day of June, 2006 at Lewisville, Texas.

[ATTACHMENTS OMITTED]

* * *

PsychLogic
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Kansas City, Missouri 64114
(816) 361-3404
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Confidential Psychological Report

Re: EDWARD N. BELL,

Petitioner,

v. Case No. 7:04CV00752

LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON

Respondent.

Subject: Edward Nathaniel Bell
Re: State of Virginia v. Edward Nathaniel Bell
Psychologist: George A. Harris, Ph.D.
Date: June 5, 2006

Reason for referral: Mr. Bell's file was forwarded for review by attorneys representing him in an appeal of his conviction on capital murder charges. The specific focus on the present review is to examine whether a prior psychological report regarding Mr. Bell adequately assessed whether or not he may have malingered on tests of intellectual ability.

Reviewed for this report: report by Connie Beck, Ph.D. and William Stejskal, Ph.D. from the Institute of Law, Psychiatry and Public Policy, January 7, 2001 (hereafter referred to as the Institute report); Affidavit by Dr. Richard Ruth, psychologist.

Also reviewed for this report:

Hurley, Kolleen and Deal, William Paul. 2006. Mental Retardation. Assessment Instruments Measuring Malingering Used with Individuals Who Have Mental Retardation. 44 (2) p 112-119.

Background: Drs. Beck and Stejskal in the Institute report wrote that they administered several tests to Mr. Bell, including: the Rey 15-Item Test, the Raven's Standard Progressive Matrices, the Bender Gestalt Test, the Clock Drawing Test, and the Trail-making Test Parts A and B. They concluded that Mr. Bell, "apparently" attempted to malinger or "fake bad" on neuropsychological testing administered. I will first examine the Institute report's procedures, reasoning and findings and later will outline recommended procedures for assessing malingering of cognitive deficits on psychological testing.

1. The Institute report cites poor performance on the Rey 15-Item Test, a test of visual memory, as evidence of malingering. It is true that this test is often used as a preliminary screening tool for malingering, but research on this instrument reveals that it is an inadequate test. Good performance does not guarantee that the subject is not malingering on other measures of cognitive ability, and poor performance does not definitively rule out actual cognitive deficits. The test is crude and is not highly sensitive. It is used as a screening tool because it is

quick and easy, but that is also why the test is inadequate. Recent research also demonstrates that persons with mental retardation do poorly on the test and are incorrectly identified as malingering on the instrument. Hurley and Deal (2006) stated, for example in their research on measurement of malingering, that, "Taken together these data at a minimum suggest considerable caution be exercised when using these various instruments (such as the Rey-15 Item Test) for assessment of individuals with below average intelligence or mental retardation."

2. The Institute report administered another test of visual motor ability, the Bender Gestalt, by asking Mr. Bell to draw the designs from memory. But the Bender Gestalt is not a test of malingering, and using it to assess malingering goes beyond the available research. Nevertheless, the Institute report stated that Mr. Bell "recalled only 4 of 9 figures, somewhat below the average number of figures that most neurologically intact people would obtain." The conclusion that Mr. Bell is "somewhat below" the average is inconsistent with concluding that he malingered, because his score implies that his performance was within the average range. It is simply not reasonable to conclude that someone scoring within an average range is malingering. In addition, the Institute report noted that Mr. Bell has "a reported history of a mild closed head injury..." The Bender Gestalt is, in fact, a test of neurological impairment, and it is reasonable that he might score "somewhat below" average on such a test.

3. On another test, the Clock Drawing Test, the Institute report described Mr. Bell as working "very slowly...much more so than one typically encounters

in the cases of neurologically impaired individuals." But the Clock Drawing Test is also not a test of malingering, and the report authors are simply providing a subjective, clinical opinion about how fast someone should work on a test. Theirs is not an opinion based on objective data and research about malingering.

4. On the Trail Making Test (also not a test designed to assess malingering), the Institute report stated that Mr. Bell's "level of performance in an otherwise healthy individual is difficult to account for, other than to infer sub-optimal effort..." Yet earlier in the report, the authors noted that Mr. Bell has "a reported history of a mild closed head injury..." thus contradicting their premise that Mr. Bell should be viewed as "an otherwise healthy individual."

5. On the Raven's Progressive Matrices test, the Institute report stated that Mr. Bell performed in a range consistent with Severe Mental Retardation, and they concluded that this score was inconsistent with other biographical information available showing that he functioned at a higher level. The authors therefore concluded that Mr. Bell was malingering. However, it is unclear what norms the authors of the Institute report used to calculate Mr. Bell's level of intelligence. Though they rated him as scoring below the 1st percentile and in the range of severe mental retardation, it appears that other norms place him in the mild range of mental retardation, a score that is likely consistent with his overall level of functioning.

In any event, one could conclude that Mr. Bell did not perform at his highest level on the Raven's test

and still conclude that he might be mildly or moderately mentally retarded. Also, though the authors of the Institute report may have had some biographical information regarding Mr. Bell, they did not have standardized measures of adaptive functioning. As a result, they are able to make only subjective comparisons of IQ measurements to adaptive functioning appraisals. Finally, though the Raven's Progressive Matrices is not designed as a test of malingering, the difficulty of the test is progressive, and Mr. Bell did show a declining level of performance on difficult portions of the test, a pattern inconsistent with malingering. However, examination of the pattern of scores on the Raven alone is an inadequate measurement of whether malingering occurred.

Procedures necessary for assessing cognitive malingering

Assessment of malingering is difficult because the term implies a conscious effort to deceive. But psychologists have no direct measures of conscious intent and are limited to inferences based on objective data. For example, if there is an easy test that merely looks difficult, malingerers may perform poorly to give a false impression of their abilities, but in so doing, they are seen as failing to give optimum performance.

Subjective assessments of effort are inadequate. It is not adequate simply to say that a person didn't look as though he were trying hard to do his best. A subject's performance must be compared statistically to normative groups. This is accomplished with, for example, a forced choice test in which a subject is shown a number briefly which is then removed.

Then, two numbers are shown, one of which is the previously shown number. The subject must choose one of the two numbers as the one previously shown. If a subject randomly guesses the answer, he will still be correct 50% of the time. In fact, it is possible with a binomial distribution to calculate the odds that random guessing would produce for every score from completely correct on all items to completely incorrect on all items.

Forced choice tests typically are easy tests designed to look difficult. These forced choice tests are useful in assessing malingering when we have norms for how individuals with various maladies perform. If a person with mild mental retardation averages 90% on the test and a subject/examinee scores only 50% correct, then we know that the subject could have randomly guessed and achieved the measured score and that even mentally retarded people can easily do the test. Thus, the inference is that the examinee didn't try very hard.

As noted earlier, however, a conclusion that an examinee didn't try to perform well on a test is not evidence that he or she is not mentally retarded. A mentally retarded person may not give good effort on a test for a variety of reasons. Consequently, assessments of mental retardation must also use medical and personal history and measures of adaptive behavior and integrate this information with all other testing. The assessment of Edward Bell included no objective assessments whatever of functional abilities. Such adaptive measures of behavior are crucial in the clinical interpretation of intelligence tests, such as the Raven's Progressive Matrices, because the consistency of scores on two types of measures of mental retardation provides

support for a diagnosis. For example, if an adaptive measure shows mild mental retardation and an IQ test shows mild mental retardation, then the clinical finding of mild mental retardation would have support from two perspectives.

An adequate assessment, then, of malingering of cognitive abilities must include objective measures specifically designed to measure malingering, such as forced choice tests, and must also include adaptive assessments. Neither of these types of tests was administered in the assessment of Edward Bell.

One final note regarding assessment of malingering may be helpful. People can malinger on cognitive tests as well as on tests of personality functioning (psychopathology). Measures of psychopathology include symptoms of depression and anxiety but also include measures of psychotic illnesses. The pathology, in imprecise language, may include "neurotic" as well as "psychotic" symptoms. There is an interplay between "neurotic", "psychotic" and cognitive symptoms. A floridly psychotic person, for example, would tend to score poorly on tests of cognitive ability. The Institute report administered no tests whatever of personality functioning and therefore could not assess the possible impact of psychopathology on cognitive performance. This deficiency in the Institute report is not as crucial as the absence of specific measures of cognitive malingering but is nevertheless a consideration in the evaluation of the overall adequacy of the final Institute report.

Summary and recommendations: As indicated in the earlier discussion of the Institute report, I

believe the authors improperly used tests that were not designed to assess malingering and misinterpreted the data that was produced by the tests they administered. Furthermore, the Institute report did not administer an adequate battery of tests to measure malingering of cognitive symptoms, which would comprise specific tests designed to measure cognitive malingering and specific tests to measure adaptive behavior deficits. The data that the Institute report produced suggest that Mr. Bell does indeed function at the level of mild mental retardation. But the primary conclusion of this present report is that the Institute report is an inadequate assessment of whether Mr. Bell did or did not malinger when taking tests administered in 2001. It is not possible with the data at hand to determine with reasonable certainty whether Mr. Bell did or did not malinger on testing administered in 2001.

I offer these opinions with a reasonable degree of psychological certainty.

/s/ George A. Harris
George A. Harris, Ph.D.
licensed psychologist

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

EDWARD N. BELL, Petitioner	)	CIVIL ACTION NO. 7:04-CV-752
v.	)	Chief Judge Jones
WILLIAM PAGE TRUE, Warden, Respondent	)	

AFFIDAVIT OF GEORGE A. HARRIS, Ph.D.

I, George A. Harris, declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a psychologist with expertise in psychological testing, mental retardation and corrections. I have conducted or supervised evaluations of an estimated 5000 persons with mental retardation and persons with criminal charges and have worked in treatment programs with such persons. I have evaluated and treated individuals who are mentally retarded who are also criminal offenders. I also have specialized training in the assessment of malingering and falsification of psychological testing. Attached hereto is a true and correct copy of my *curriculum vitae*.

2. I was asked by attorney Matt Roskoski to review a file of Edward Bell, including the report from the Institute of Law and Psychiatry by William

Stejskal, Ph.D. and the notes and test protocols from that assessment.

3. Dr. Stejskal administered a standardized test of intelligence, the Ravens Progressive Matrices, which placed Mr. Bell clearly within the range of mental retardation. My preliminary examination of the test data suggests that the results are indeed a reasonable indicator of his cognitive functioning. I believe it is highly likely that administration of other tests of intelligence would produce the same result.

4. Dr. Stejskal did not administer any formal testing of adaptive behavior skills as is ordinarily done to assess mental retardation. I believe it is very probable that such testing would also result in a diagnosis of mental retardation.

5. Attempting to measure limitations in adaptive behavior by considering on an ad hoc basis tasks Mr. Bell can perform, *e.g.* menial employment, earning average grades in a foreign school of unknown academic rigor, driving a car, using a cell phone or pager, or reading the Bible, is neither clinically appropriate nor scientifically sound. A clinically appropriate assessment of adaptive functioning would focus on a broader and more comprehensive array of life skills, because mildly mentally retarded individuals frequently perform well at some tasks yet still exhibit significant limitations in adaptive behavior as revealed by their poor performance on other tasks.

6. For example, a person who is mentally retarded may be able to use a cell phone to call well-rehearsed numbers but may not be able to use a phone book. A person who is mentally retarded might be observed to read a Bible but may have very

limited understanding of what was read. Many persons who are mentally retarded hold jobs and even support others financially, but their jobs are typically routine, repetitive tasks, such as busboys, car wash attendants, laundry workers, etc.

7. Thus, a clinically appropriate evaluation would involve a detailed assessment of each life skill being evaluated—attempting to measure, for example, whether Mr. Bell drives a car with the same flexibility that a person of normal intelligence would or whether, instead, he struggles even to follow a limited number of routes he knows only through rote memorization. Such detail would be indispensable to a clinically appropriate evaluation of adaptive functioning.

8. I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 11, 2005

/s/ George A. Harris
George A. Harris, Ph.D.

[Resume omitted]

* * *

IN THE SUPREME COURT OF VIRGINIA

EDWARD N. BELL,	)	
Petitioner	)	
	v.)	Record No. _____
	)	(capital habeas
PAGE TRUE, WARDEN	)	proceeding)
Sussex State Prison,	)	
Respondent	)	

AFFIDAVIT

I, Dawn Jones, being duly sworn, state the following upon my information and belief:

1) I dated Edward Bell shortly after he arrived in the United States from Jamaica.
2) Eddie and I had a daughter together, her name is Kydesha and she is 8 years old.
3) Eddie was always a very good father. He was very loving and affectionate.
4) When Kydesha was born, she was premature. She had to stay in the hospital for some time. I was also in the hospital for several days at that time. While I was in the hospital, I hadn't seen Eddie for some time and I was calling all over town trying to find him. Eventually a nurse came and told me that Eddie had been sitting by Kydesha's bedside the whole time.
5) After we broke up, Eddie would take Kydesha for weekends and I would have her during the week.
6) Eddie helped support Kydesha financially.
7) Eddie's trial lawyers never interviewed me.

8) I felt harassed, intimidated and pressured by the police when they approached me several times to testify.

9) Ultimately, I was subpoenned to testify for the prosecution at the penalty phase of Eddie's trial, regarding an incident when Eddie possessed a gun.

10) Eddie's attorneys did not ask me any questions when I testified.

11) I was very surprised because I wanted to testify on Eddie's behalf and I would have testified to the above.

~~Signed this ____ day of March, 2003, under the pain and penalty of perjury.~~

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 2006.

/s/ Dawn E. Bailey 6/21/06
Dawn Jones

~~COMMONWEALTH OF VIRGINIA~~
~~COUNTY/CITY OF _____, SUBSCRIBED and SWORN before me in my jurisdiction aforesaid, this ____ day of March, 2003.~~

_____
~~Notary Public:~~
~~My Commission Expires:~~

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,	Civil Action No. 7:04cv00752
Petitioner,	
vs.	Harrisonburg, Virginia
WILLIAM PAGE TRUE,	July 5, 2006
Respondent.	

TRANSCRIPT OF OPENING COMMENTS
AND MOTIONS BEFORE THE
HONORABLE JAMES P. JONES,
UNITED STATES CHIEF DISTRICT JUDGE

* * *

[2] THE COURT: Good morning, ladies and gentlemen.

The clerk will call the case.

THE CLERK: Edward N. Bell v. William Page True, Case No. 7:04cv752.

THE COURT: This is the date scheduled for our evidentiary hearing in this case.

Is the petitioner ready to proceed?

MR. CONNELL: Yes, Your Honor. Thank you.

THE COURT: Is the state ready?

MS. BALDWIN: We are, Your Honor.

I'd like to introduce two Assistant Attorney Generals from our office, Susan Harris and Steve Witmer.

MR. CONNELL: I'm James Connell. With me is Matthew Roskoski, Katherine Saunders and Brian Stekloff, who will be noting an appearance.

THE COURT: I'm ready to proceed.

Petitioner may proceed with his evidence.

MR. CONNELL: There's two brief matters to seek the guidance of the Court. Both relate to the exhibits.

The first is, I'd like to get the Court's guidance on what is the relationship of the exhibits which are already of record to the hearing itself. It's our position this is not a trial, but simply an [3] evidentiary hearing that expands a pre-existing record.

THE COURT: I agree with you.

MR. CONNELL: There are matters not of record which we will introduce, but—

THE COURT: The state record is part of this case.

MS. BALDWIN: Thank you, Your Honor.

I just want to make clear that it's the respondent's position that any affidavits that have been generated in any habeas proceedings, we object to those being part of this evidentiary hearing. That's the reason we're having a hearing, so witnesses can testify and be cross-examined. But I have no objection to the entire criminal trial record being made part of this proceeding.

THE COURT: Let me tell you my view. I think all of the matters that have been previously filed are part of the record in this case. The question is whether I can consider certain things in that record. I think that's an open matter. I certainly will listen to counsel's position in that regard. But it does not

need to be reintroduced if it has already been introduced as an exhibit or as part of the state record. But again, the question is whether it's entitled to evidentiary consideration. But I think just for utility, we just [4] need to consider everything that's been in the record is part of the record which I can potentially consider.

MS. BALDWIN: I understand the Court's ruling, Your Honor.

The respondent would move to exclude all the witnesses, Your Honor.

MR. CONNELL: We have no objection.

THE COURT: Very well.

MS. BALDWIN: Just for the Court's information, the respondent only has two witnesses, the trial attorneys, Mr. Williams and Mr. Fischel. They are here and not in the courtroom. I've spoken to them and they understand they're not to come in the courtroom.

THE COURT: I'll grant the motion.

If you may be a witness in this case, it will be necessary for you to be excluded from the courtroom so that you cannot hear the testimony of any witness who testifies. In addition, part of this order is that no person who is excluded who may be a witness in this case should be advised of the testimony of any witness who has previously testified. So if you're going to be a witness in the case, you must wait outside. You can do that now. Thank you.

(Witnesses left the courtroom).

MR. CONNELL: Your Honor, another matter is [5] housekeeping. When we do have exhibits that are not part of the record, does the Court like us to hang

on to those and give them to the clerk at the end of the day or pass them up, one by one?

THE COURT: I'd like you to hand them up one by one so the clerk can keep track of them.

MR. CONNELL: Our first witness will be Mr. Cooley and Mr. Roskoski will be conducting that.

MR. WITMER: Your Honor, I'd like to bring to the Court's attention, the respondent raised the propriety of Mr. Cooley testifying. It's our position testimony of this nature is not necessary in this pleading. The Court is the expert on what the standard of care was for these attorneys. For the reasons more fully stated in the pleadings, we would ask the Court not to permit this testimony at this time.

THE COURT: I'll overrule the objection. You may proceed.

MR. WITMER: Your Honor, once the witness takes the stand, may we voir dire the witness?

THE COURT: For what purpose would you voir dire the witness?

MR. WITMER: His qualifications, Your Honor.

THE COURT: The witness has previously filed an affidavit in which he has set forth his **[6]** qualifications and I have reviewed that affidavit. What is the nature of your objection to his qualifications?

MR. WITMER: Your Honor, we would hope to establish through voir dire that Mr. Cooley has nothing to offer specifically beyond an opinion as to what the law is, which this Court itself can discern from the precedence of the U.S. Supreme Court.

THE COURT: I recognize the basis of your objection, but in the interest of time and fullness and

fairness, I'm going to deny your motion to voir dire and I'll allow you to cross-examine him, of course.

So we may proceed with Mr. Cooley.

(All witness testimony previously transcribed under separate cover).

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,	Civil Action No. 7:04cv00752
Petitioner,	
vs.	Harrisonburg, Virginia
WILLIAM PAGE TRUE,	July 5, 2006
Respondent.	

TRANSCRIPT OF TESTIMONY AT
EVIDENTIARY HEARING BEFORE THE
HONORABLE JAMES P. JONES,
UNITED STATES CHIEF DISTRICT JUDGE

* * *

[2] THE COURT: Mr. Cooley if you'd come forward, please, and be sworn.

CRAIG COOLEY, CALLED AS A WITNESS BY THE PETITIONER,

SWORN

DIRECT EXAMINATION

BY MR. ROSKOSKI:

Q. Good morning, Mr. Cooley.

A. Good morning.

Q. Would you please state and spell your name?

A. My name is Craig S. Cooley. C-r-a-i-g; middle initial S, as in Sam; and Cooley, C-o-o-l-e-y.

Q. Thank you, sir. What is your profession, Mr. Cooley?

A. I'm an attorney.

Q. How long have you been in practice?

A. Since 1977.

Q. Have you defended capital cases, sir?

A. I have.

Q. How many?

A. I am currently with my 62nd capital defendant.

Q. Were you defending capital cases in the years 2000 and 2001 in the Commonwealth of Virginia?

A. I was.

Q. Do you also teach courses in capital defense?

A. I co-teach. I am an adjunct professor at the [3] University of Richmond law school and I co-teach a course in capital litigation there and I have for about the last eight years.

Q. Do you also teach at seminars and CME programs, sir?

A. I do.

Q. Are you familiar with the norms of professional practice that govern the capital cases in Virginia in the years 2000 and 2001?

A. I am.

Q. Have you ever been qualified to give expert testimony on the standard of capital cases?

A. I have been.

Q. In what court?

A. State courts, circuit courts. I've also been qualified in the Eastern District and Western

District for United States District Courts for Virginia.

Q. Have you ever been proffered as an expert but not qualified by the Court?

A. No.

Q. Do you testify often in ineffective assistance of counsel cases, sir?

A. I do not.

Q. Why is that?

MR. WITMER: Objection, relevance.

[4] THE COURT: I'll overrule the objection. Go ahead.

THE WITNESS: I'm a trial attorney, so I don't like folks second-guessing me and I generally don't want to second-guess other counsel. I do so on a very, very limited basis. I'm often asked and I turn down about 90 percent of the requests.

BY MR. ROSKOSKI:

Q. Thank you, sir.

Are you being paid for your testimony here today?

A. I am not.

MR. ROSKOSKI: At this time, Petitioner offers Craig Cooley as an expert on the standard of practice in defending criminal cases in Virginia in the relevant time period.

THE COURT: Yes.

Let me advise counsel of my process that I wish to follow in regard to expert testimony in this hearing. It is not necessary to proffer the witness. We have no jury and the Court will be making findings of fact in this case. Therefore, I will simply, upon hearing the qualification of the witness, make my judgment as to the witness's credibility and

ability to make judgment and opinions within the witness's qualifications. Of course, each witness will be subject **[5]** to cross-examination as to the witness's qualifications, as well as opinion.

You may proceed.

BY MR. ROSKOSKI:

Q. Thank you, Your Honor.

Mr. Cooley, did you prepare a report in this case?

A. I did.

Q. Can we see number 106, please?

Mr. Cooley, is that the first page of your report?

A. It is.

Q. I draw your attention to page four. Is that your signature?

A. It is.

MR. ROSKOSKI: At this time, we move the admission of Mr. Cooley's report into evidence.

MR. WITMER: Your Honor, would the Court note our previous objection with respect to this affidavit?

THE COURT: Yes, sir.

Is this the same report that's been previously filed.

MR. ROSKOSKI: Yes, Your Honor, it is.

May we have a number assigned?

[6] THE COURT: It will be Petitioner's 1.

(Petitioner Exhibit #1 was marked for identification).

BY MR. ROSKOSKI:

Q. Mr. Cooley, from here on out, I'd like to ask you to discuss the standard of practice in Virginia in 2000 and 2001. For brevity, I may not begin our

question that way, but that's what I'll be asking about.

MR. WITMER: I'll object. Counsel's performance is subject to a single standard by the U.S. Supreme Court, regardless of whether the practice is taking place in Virginia or elsewhere.

THE COURT: Mr. Cooley, let me ask you this. I take it your experience has been in Virginia; is that correct?

THE WITNESS: Yes, sir, it has, exclusively.

THE COURT: Again, I will consider the witness's opinion within the requirements of law. It's understood he has no experience outside of the state.

BY MR. ROSKOSKI:

Q. Mr. Cooley, in the penalties phase after capital trial, what do the professional norms in Virginia call for an attorney to do?

A. Of course, there are two stages, but counsel, in preparing for the penalty side of the case, has an [7] obligation to develop any mitigation to prepare for the rebuttal of any aggravating evidence that might be offered by the Commonwealth. Specifically, you are in a position to try to put forward as much favorable mitigation in the sentencing phase as possible, to place the defendant in the best possible light and to, if at all possible, give an explanation for what has occurred or how that particular defendant has gotten to that point where this could have occurred.

There are a lot of things that go into that and I'm not sure if you want me to continue, but there certainly are specific things expected of counsel and would have been the norm for the years 2000, 2001.

Basically, a preparation for a mitigation case involves three primary things: Collection of data, getting as much information by way of documentary background that you can; secondly, interviewing witnesses that have information favorable or unfavorable about the defendant; and thirdly, preparing on the mental health side of the case. That is -- the mental health side of the case may encompass, as may all of these things, both the guilt/innocence phase and the penalty phase. But specifically as to penalty, Virginia has a statutory enactment of the Ache v. Oklahoma. We have allowed, and have by statute for a long time, in [8] effect, required the appointment of a mental health expert to specifically address mitigation issues and prepare for any mental health testimony or presentation that may occur at the penalty phase.

Q. Thank you, sir. That mental health professional that you just discussed, can you give us more detail on what their role is in preparation for the mitigation case, please?

A. The statute sets forth a criteria for them. They're commonly referred to as a 3:1 expert and that comes from the Virginia statute 19.2-264.3:1. The statute specifically provides that the mental health person is to look at such things as whether there has been some -- there's some mental limitation. It may not rise to the level of sanity or insanity defense, but it may be some limitation or mental health issue that would be mitigating. It requires the person who is appointed as that mental health expert to look at mental health issues and then specifically under the subparagraph 3(i), there is this broad direction that all issues of history, background, what most of us would call a social

history type of background, is to be part and parcel of what is done.

Q. So how is the 3:1 expert's work then compared to an overlap of authority of a mitigation investigator?

[9] A. They are separate, but they certainly have to be working in conjunction. A mitigation expert should be developing all information. That may be broader than the general sense of what mental health testimony might be. But all of the information that's developed by a mitigation expert would be and should be supplied through counsel or directly to, with knowledge of counsel, the mental health expert. The mental health expert has to have as broad a picture of the background of the defendant as possible in order to really be able to make informed decisions as to whether or not this falls into a particular, for instance, category under the DSM, whether the person has a mental disorder or has some particular affliction that might be appropriate to present to the jury in order to explain the actions or how the person got to that point. So a mental health expert is working specifically in areas of whether they are going to present mental health testimony. But they have to be provided all the information a mitigation expert develops.

Q. Would there be areas of mitigation evidence that you would not expect a 3:1 expert to seek out and find on their own?

A. Yes, there would be.

Q. Could you give us some examples of what that [10] might be?

A. Again, I think you're talking about how broad is the investigation. There would be things that a

general mitigation expert might be finding that really don't relate to mental health and wouldn't potentially affect a mental health testimony. So while you may still want the mental health expert to be made aware of that, that may have nothing to do with the ultimate testimony or decision as to whether to put on testimony for the mental health expert.

Mitigation expert is looking at background in every respect, from birth upwards; medical records. They're looking at if a person has been in the military, military records. They're looking at school records. They're looking at, perhaps, prison and parole records, if that applies to a particular defendant. Any type of background information would be the overall responsibility of the mitigation expert.

Q. Now, the collection of that body of information that you just described, would you interview witnesses or potential witnesses to collect that information?

A. Absolutely.

Q. Can you tell us the minimum set of witnesses that an attorney or a mitigation investigator ought to pursue to comply with the prevailing standards of conduct?

[11] A. I think the bare minimum, you would start with the immediate family and expand from there.

MR. WITMER: Your Honor, I'm going to object because there is not a constitutional right to a mitigation expert. This should be in terms of the investigation counsel is required to conduct, not the

investigation a mitigation investigation expert is required to conduct.

THE COURT: Who were you talking about, Mr. Cooley?

THE WITNESS: Ultimately, of course, it's the attorney's responsibility. Both the standard I'm addressing is the attorney's responsibility. Now that may be delegated in some cases to a mitigation expert. It may be delegated in part to just an investigator. It may be delegated in part --

THE COURT: I'll overrule the objection.

You may proceed.

BY MR. ROSKOSKI:

A. I'm sorry. Your question?

Q. The question was, the attorney, as the person bearing the ultimate responsibility for this investigation, either directly themselves or through their mitigation specialist, could you give us an idea of bare minimum of witnesses they ought to interview to [12] comply with the professional norms?

A. It should start with the immediate family. It normally would include any known family member that is easily accessible. It would involve, for instance, aunts and uncles, grandparents, that sort of thing that might not be immediate family. It would also involve any type of close associates. Many times, there are relationships that are not really familial. They may be close friends. They may be the other parent of a mutual child that the defendant is not married to. It might be any one of those close associations, might be close family and such.

You would also want to be interviewing anybody that has some sort of relationship such as a coach, a

teacher, folks that have had substantial contact with the defendant and would have been in a position to have observed actions, observed interrelationships between the defendant and other people, good or bad, and to supply as much information about that person to fill in as much background as they possibly can so that, first of all, the attorney, through whether it be a mitigation expert or such, has a really good understanding of who the person is and then is in a position to decide what to present in order to mitigate if you get to the penalty phase.

[13] Q. Sir, those people that you just described, what if some of them have negative things to say about the defendant? Do you interview them anyway?

A. Certainly. You interview witnesses with the idea of, one, you may be interviewing a witness that has the information as to an aggravator. They may be the person who's describing unadjudicated conduct or that sort of thing. You want to have as much information as you can to hopefully rebut that, but at least understand where the prosecution is coming from. So in that sense, you absolutely want to interview people who may be negative entirely. But also there are people who may have -- whenever you interview a witness, you want to know anything favorable or negative they can say to you about the defendant because, one, you want to be prepared to defend, but also, they may have three negative things to say, but they may have one or two positive things to say. When you're talking about mitigation, you have to know what those are in order to balance, is this a witness we want to put on, is the risk too great or is it a necessary risk? So you always want to know positives and negatives with every witness

you're interviewing, whether you expect them to be your most favorable witness or the reverse of that.

Q. Is it ever consistent writ norms of professional [14] practice to refuse to interview a witness because you're afraid of what they'll tell you?

A. Interview or cross-examine?

Q. Interview.

A. It would not be sensible to not interview them.

Q. Is it ever possible to make a truly informed decision about whether to present a witness or to present their evidence until you've interviewed them and exhausted what they've had to say?

A. I would say no, and I think that was the standard.

Q. Thank you, sir. When you interview these witnesses, do they sometimes lead you to other witnesses?

A. Very often, they lead to other witnesses. That's something you would certainly ask in the course of the interview, are you aware of other relationships that the defendant has; are there people that you know that might have information, good or bad, that they could supply to us or that we could interview. So very often, it's kind of an expanding circle. You start with the folks closest -- start, of course, with the defendant. Then you start with the close family and it expands from there. It continues to expand in most instances.

Q. Thank you, sir. Now, could you tell us a little [15] bit -- you've told us who you interviewed. Could you tell us a little bit about what you ask when you do interview them?

A. As a general rule, you get background information about them. I think good interviewers --

and not all counsel are good interviewers. Sometimes mitigation specialists are better at it. You want to get them comfortable with you so you're asking questions that you can compliment them on, asking them what they've done, who they are, where they're from and try to build some rapport and then they're more comfortable answering your questions candidly. Then you begin to ask questions about the defendant, what their knowledge is, what their observations are about the defendant, what they've seen in terms of interrelationships with other people in other circumstances, good and bad. As that develops, you often will get descriptions of things that the defendant has done, kindnesses to a neighbor, kindnesses to a family member, kindnesses to a stranger or the reverse of that. Both of those things are important to understand. You also then expand the interview to who else do you know that the defendant knows; do you have any suggestions. You ask if they observed -- for instance, a lot of times you'll have a friend that grew up with the defendant and they will know of something **[16]** where the defendant got knocked out or had a head injury he may not have ever told parents about. Anything like that that might impact mental health specialists, they would want to know about.

So you ask as much basic information as you can and you continue to expand that interview to take in other people or other relationships that the person being interviewed might have observed.

Q. Thank you, sir.

What is the role of victim outreach in preparing mitigation in a case?

A. Victim outreach is an area that has been listed as something counsel might want to consider. It's been in the ABA guidelines since at least '89. I'm not sure that I can say that that is something that I think was part of the standard or norm. If you have a clear-cut member of the victim's family that is opposed to the death penalty in this particular case, you may reach out to them. It is an area that can also turn out to be offensive to the people you're reaching out to. It is something that ABA has always suggested as an alternative. It is never a replacement for investigation.

Q. Thank you, sir.

You just mentioned the 1989 ABA guidelines. Are [17] you familiar with those guidelines, sir?

A. Generally.

Q. We have a minor technical problem. I'll give a copy to Ms. Baldwin and one to the clerk.

Mr. Cooley, do you recognize the cover page of the document you see on the screen?

MR. WITMER: Your Honor, we're going to object to anything having to do with the ABA guidelines. The standard is set forth in Strickland. The ABA guidelines are not the standard by which counsel is bound before this Court.

MR. ROSKOSKI: Your Honor, may I respond?

THE COURT: You may.

MR. ROSKOSKI: Our view is as the guidelines have been relied upon as informative of describing that standard and fleshing it out by the Supreme Court in three back-to-back cases, they're certainly material, and Mr. Cooley can tell us whether they were adhered to by attorneys in Virginia at the time.

THE COURT: I'll overrule the objection in terms of a full and meaningful hearing today and of course, reserve any ruling or judgment on the correct legal standard to apply to this evidence.

You may proceed.

MR. ROSKOSKI: Thank you, Your Honor.

[18] BY MR. ROSKOSKI:

Q. Mr. Cooley, do the 1989 ABA guidelines accurately describe the standard of professional care that was in place in Virginia in 2000 and 2001?

MR. WITMER: I'm also going to object on the grounds that the guidelines speak for themselves.

THE COURT: I'll overrule the objection. Obviously, in the interest of time, we need to move along.

MR. ROSKOSKI: I'll keep it brief.

THE COURT: You may proceed.

THE WITNESS: In general, they do. There are some things I think are probably beyond what was a reasonable expectation of counsel.

BY MR. ROSKOSKI:

Q. In terms of their description of the investigation to be conducted prepatory to the penalty phase, are there any significant deviations from what the standard was in Virginia at the time?

A. No.

MR. ROSKOSKI: At this time, we move that the guidelines be admitted into evidence.

THE COURT: Subject to the respondent's objection, it will be admitted as Petitioner's Exhibit #2.

[19] (Petitioner Exhibit #2 was marked for identification and admitted into evidence).

MR. ROSKOSKI: Thank you, sir.

BY MR. ROSKOSKI:

Q. Mr. Cooley, have the guidelines been updated?

A. They have been.

Q. Are you familiar with the 2003 update?

A. I am.

MR. WITMER: Your Honor, if the Court would note our objection for the same reason as to petitioner's previous exhibit.

THE COURT: Yes, sir.

Counsel, what would be the relevance of the updated guidelines?

MR. ROSKOSKI: Your Honor, just for the completeness of the record. The Supreme Court mentioned them as well and we wanted to make sure to provide them as well.

THE COURT: It does seem to me for the purpose in which you have called this witness, that is, to determine the standard, in effect, at the time of the petitioner's conviction at sentencing, it seems to me there would be less relevance here and I'll sustain the objection to the introduction of the revised standards.

BY MR. ROSKOSKI:

[20] Q. Thank you, Your Honor.

Mr. Cooley, I'd like to discuss with you now what happens when you have a defendant from another country. Do Virginia judges ever allow funding for investigation of mitigation evidence outside the United States?

A. They have. It's not common, but they have.

Q. With respect to the prevailing standard in 2000, 2001, what would an attorney's duty have been when faced with such a defendant?

A. Well, the duty to investigate doesn't change wherever the defendant is from. Now, having a defendant who is from a foreign country creates problems that are obvious to the judge or attorney. You don't have subpoena power, you don't have the ability to just get in your car and drive down and talk to somebody. So it creates problems from expenses, from a logistical standpoint. That does not mean you do not make the same efforts to secure the same documents to interview those people who would have been part of the social background of the defendant. That can be done. I suppose the best way ever is to look somebody in the eye and have that direct discussion with a potential witness.

THE COURT: Let me ask you this, Mr. Cooley. Was it at the time -- would it be possible to introduce testimony of an out-of-country witness in a criminal **[21]** trial in Virginia? Is there any process for doing that by deposition?

THE WITNESS: If they were here?

THE COURT: No. In other words, you recognize no subpoena power and is it possible, was it possible in Virginia, to introduce their testimony through deposition, criminal trial, by the defendant?

THE WITNESS: Only by agreement of the Court and the prosecution could that have been done.

THE COURT: So if the Commonwealth's attorney did not agree and a witness would not voluntarily come to this country, then that evidence could not be presented.

THE WITNESS: I think that's correct. It is possible -- let me give you one other possible scenario and this may not be a realistic one. They have the ability to close-circuit television a person who is somewhere else, sworn in, if you go down to Williamsburg, in the Courtroom of the 21st Century. How often that's ever been used, I don't know, but they have the capacity to actually have a witness on screen in the courtroom that's somewhere else, has been sworn in --

THE COURT: There's a capacity, but is that authorized under any Virginia procedural law?

THE WITNESS: I think that would have to be **[22]** done by agreement, again.

BY MR. ROSKOSKI:

Q. Mr. Cooley, if a witness were willing to come to the United States to testify and it were possible to make a showing of the relevance of their testimony, would a Virginia judge ever provide funding to travel then?

A. They have in the past. Again, that's not common. Of course, the greatest percentage of capital defendants are not from a foreign country. So we have a limited number of these cases. But certainly it has been done, again, very infrequently.

Q. In your report, you say --

THE COURT: Let me ask you the follow-up on that. Have you, Mr. Cooley, ever had any personal experience in obtaining a witness from a foreign country?

THE WITNESS: I have. It was in 2003, not 2000, 2001, but I have.

THE COURT: You received a Court order permitting payment of expenses, travel expenses, for such a witness.

THE WITNESS: Yes, sir, substantial, actually, for a number of witnesses. We have to go convince them to come. We have to identify them first **[23]** through an investigator or through a mitigation expert.

THE COURT: I take it that there would also be travel restriction questions, Visa problems, perhaps.

THE WITNESS: Yes, sir, there are substantial Visa -- a lot of folks, depending on what country and their particular financial worth, a lot of countries, it's difficult to get a Visa to come into the United States. It's difficult for folks who live in an impoverished area of a country to get to where they have to go to get a passport and then to get a Visa and transportation back and forth has to be funded from wherever they are to wherever they have to go to get those documents. Then you have to make arrangements, to, one, if they qualify and get the Visa, to transport them by plane or however to this country.

THE COURT: I take it that certain persons would be ineligible for Visas, such as, for example, if they had been convicted of serious crimes.

THE WITNESS: There is -- that is the case and there are some special Visas that can be given. It's through, at this point, Homeland Security and a law enforcement group or prosecution group has to sign on. If they're perceived to be a material witness, I suppose the Court could sign on, as opposed to a prosecution. They can actually come in on this. It's called a Parole **[24]** Visa and they come in to the

country and they're supposed to be met by somebody from the law enforcement group that sponsors them and that person is supposed to stay with them through the time that they testify and then are put back on to the plane to go back out. It can be done. There are a lot of hoops to jump through, but it can be and has been done.

THE COURT: Thank you.

You may proceed.

BY MR. ROSKOSKI:

Q. I just have one last question, Mr. Cooley. We've talked at length about mitigation specialist and 3:1 expert, but at the end of the day, whose job is it to investigate and present a case in mitigation in a capital case?

A. At the beginning of the day, middle of the day and end of the day, it is counsel's responsibility to develop the mitigation of the case, using whatever resources they can get from the Court or from any other source.

MR. ROSKOSKI: Thank you. I have no other questions.

THE COURT: Mr. Cooley, you express no opinion as to the facts of this particular case; is that true?

[25] THE WITNESS: That's correct. I have been asked here just to speak to the standard in 2000, 2001.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. WITMER:

Q. Mr. Cooley, you have indicated or you responded to a question that would require you to

require a bare minimum list of the things that should be done in the context of a mitigation investigation; is that correct?

A. Yes, sir.

Q. Has the United States Supreme Court ever endorsed such a list of specific steps that an attorney is required to take in any given case?

A. Specific steps? The Wiggins case, of course, starts to address the general responsibilities and the expectation that counsel will do a meaningful investigation and that that's necessary before any type of tactical decision can be made at both stages.

Q. Mr. Cooley, has the U.S. Supreme Court ever announced a list of specific things that a lawyer is supposed to do in the context of mitigation investigation, specific witnesses to be interviewed, specific things to be done?

A. No.

Q. Now, in the context of the 3:1 mental health **[26]** expert, you indicated that that is, in some respects, responsive to the United States Supreme Court decision in Ache?

A. I am told that Mr. Ache pronounced it "ache" but yes, we're talking about the same case. I think the original codification of that statute was designed as a response to the Ache case.

Q. Under Ache, the defendant is required to make a threshold showing of need before he gets experts, but if he makes that threshold showing, he is entitled to the expert if that is necessary as part of the basic tools of his criminal defense; is that correct?

A. That is correct.

Q. Under Section 3:1, however, isn't the defendant entitled to an expert without making any threshold showing?

A. That is correct.

Q. That expert, my understanding of your testimony, is that he is not there just for the sole purpose of evaluating the mental condition of the defendant, but that he is also there for the purpose of conducting other sorts of mitigation related activities.

A. Yes, that is true, as to history, background, information as to the defendant.

Q. And that would include social history type [27] information about the defendant, would it not?

A. It certainly should, yes.

Q. You testified that it is unacceptable not to interview certain potential witnesses, did you not?

A. Yes.

Q. Is it ever acceptable for an attorney to, based on information in his possession, reasonably limit the scope of his investigation in a criminal case?

A. To limit the investigation -- give me a -- limiting mitigation investigation? I don't know of any justifiable reason to not pursue that.

Q. So you're suggesting here today that although the general rule is that an attorney may make a determination not to pursue certain avenues of defense, as long as that determination is justified by a reasonable view of the facts available to that attorney, that limitation does not apply in the context of mitigation in a capital case; is that correct?

A. You've mixed, in my opinion, or at least I've understood your question, as apples and oranges. Investigation in preparation to make the decision, what you put on as the defense case, I don't know of any reason to limit reasonable investigation. Now, once you've done that, you may well decide after that investigation, I'm not going to put this witness on or **[28]** I'm not going to pursue this theme, so presentation of the defense or the mitigation case to a jury or a judge may well -- an attorney may well exercise discretion to limit that.

THE COURT: Mr. Cooley, getting back to the investigation part, understanding that the actual trial presentation is subject to tactical considerations, but as you said, there are certainly reasonable limitations. For example, I suppose you could -- it's possible that you could find somebody who knew a defendant by sending a letter to every person in the United States. Obviously, you can't do that. You're not going to do that. There's some reasonable limitations.

THE WITNESS: Absolutely.

THE COURT: There's no manual that tells you what that is. That's based on the attorney's experience and judgment, correct?

THE WITNESS: Absolutely.

THE COURT: What is a reasonable step.

THE WITNESS: I think that's exactly right. In interviewing every third cousin who never met him but is related or something like that, unless you found out that third cousin had a particular bond with the defendant, there certainly are cut-offs. That's why I think the question was put to me, at least as I **[29]** understood the answer that I was

giving, what's the bare minimum. The list of folks that I mentioned I think is the bare minimum. Where you go beyond that is really a function of the particular case.

THE COURT: And of the attorney's judgment and experience.

THE WITNESS: Absolutely.

BY MR. WITMER:

Q. In the context of interviewing witnesses, your bare minimum list included interviews with immediate family and you qualified that by suggesting that that was necessary, at least as to those members who were easily accessible; did you not?

A. Correct.

Q. And if an attorney conducted a social history investigation of the defendant by interviewing the reasonably available witnesses and there were other family witnesses who were not reasonably available because they were in a foreign country, for example, an attorney could then make a reasonable professional judgment as to whether he could limit the investigation at that point; is that correct?

A. It's correct to the extent everything except I don't think I would qualify just because somebody is in a foreign country that that doesn't make them readily **[30]** accessible. You certainly have telephones. There are a variety of ways. It depends, of course, on what foreign country. If it's an industrialized nation, then you may well be able to carry on quite a bit of conversation by e-mail and variety of electronic means. You can write to those folks and telephone them, in most instances. Just because they're in a foreign country doesn't mean

they're not readily accessible. If they're living in a cave in Afghanistan, then they probably are well beyond what any reasonable attorney would be looking for. But you make that determination. You just don't decide, well, they're not here or they live in Utah so I'm not going to contact them because they're not in this particular immediate locale.

Q. Mr. Cooley, the ABA standards that were admitted as Petitioner's Exhibit #2 for purposes of this hearing, have the Courts ever adopted those standards as part of the Strickland standard?

A. Not to my knowledge. The more recent Supreme Court cases have certainly indicated that the ABA guidelines are a reasonable expectation, but they have not adopted them as you have to do this.

Q. You spoke about the duties of a mitigation specialist or mitigation expert. Do you differentiate between those two terms?

[31] A. Mitigation expert and mitigation specialist, no, sir, I didn't mean to.

Q. What would be, in your mind, the qualifications for such an expert?

A. Well, mitigation specialist or expert, whichever term you want to use, are people who have a particular expertise in gathering information, knowing who to contact, how to contact; have, perhaps, a greater skill in interviewing. Attorneys are sometimes focussed on law and some attorneys are not very good people-people, if that makes any sense. They don't have good people skills. A lot of mitigation people have that knack of being able to engender an immediate trust with whoever they're interviewing, get a much more candid response from

them. Those are things I would look for and I think that counsel is well advised to look for.

Q. But a mitigation expert is not something counsel is required to obtain in every case, are they?

A. A mitigation expert is not required. Some judges over the years have strongly held to a position that the attorneys should do all of the investigating, the attorneys should do all of the work in terms of preparing mitigation, other than what the 3:1 expert does.

THE COURT: Let me expand on that, Mr. [32] Cooley. So your experience in Virginia and particularly at the time of the events in this case, was that not all Courts, not all judges believe that it was necessary to specially appoint or authorize a mitigation expert.

THE WITNESS: Other than 3:1 expert, yes, sir.

BY MR. WITMER:

Q. Mr. Cooley, you indicated some attorneys are better than others at relating to people, gathering information, interviewing them, those sorts of skills. If an attorney feels that his skills in that area are adequate, could he make a reasonable decision not even to pursue a mitigation specialist?

A. I think they could, yes.

Q. And just as these skills vary from attorney to attorney, wouldn't these skills also vary among mitigation specialists, be they psychologists or social workers or whatever?

A. I'm sure that's true.

Q. Some are better than others.

A. That's true.

Q. In the context of information you would expect that mitigation expert to gather, you indicated you would expect them to gather the negative evidence as well as the positive evidence in the context of the [33] social history and background investigation.

A. Correct.

Q. So you would want to know as much as you can about the client, the good, the bad and the ugly?

A. Correct.

Q. If a mitigation specialist presented you with a report that only focussed on the nice things that people had to say about the defendant when he was growing up and presented none of the negative information that was available, such as information about the defendant's prior incarceration, his behavior while in incarceration, his criminal history in the community and so on, so forth, would that mitigation specialist be doing their job?

A. I think the answer is that there are some that would do that. It's the attorney's responsibility up front to explain to the mitigation -- anybody that's working for the attorney, this is what I want. So it would depend on -- when you say are they doing their job, if the attorney told them that's all I wanted, I think that would be a mistake, but if that's what they told them, they would be doing their job. But a good mitigation person is going to be looking at everything because it has to be in the context of everything. You put a witness on the stand, expecting that they're going [34] to have three golden things to say about the defendant and that's all they have and then you find out there are five negatives, you would have want that information up

front in order to be able to weigh whether you use or don't use that particular witness.

Q. Mr. Cooley, you're familiar with the Strickland standard for counsel's performance, are you not?

A. Yes, sir.

Q. Petitioner in a habeas case is required to establish both efficient performance by his attorney and actual prejudice; is that correct?

A. That is correct.

Q. The standard for counsel performance in Strickland is simply that of reasonableness, isn't it?

A. Yes.

Q. Defendant is entitled to the adequate assistance of counsel, correct?

A. That is correct.

Q. The Strickland standard does not permit counsel's actions to be viewed in hindsight, does it?

THE COURT: Let me interject, counsel. I understand your objection was this witness was not needed at all, but certainly what Strickland says is a matter for the Court. Unless there's some other purpose behind your questions that I don't divine --

[35] MR. WITMER: I'll move along, Your Honor.
BY MR. WITMER:

Q. Mr. Cooley, despite your vast experience as a criminal defense lawyer, you've had clients criticize your performance, haven't you, from time to time?

A. I'm sure I have, justifiably on occasion.

Q. And have you had former clients ask Courts to look at your performance with 20/20 hindsight, basically?

A. I'm aware of one, in a capital case.

Q. What about non capital cases?

A. Probably less than five over 30 years, that I'm aware of. If you're asking do they bad-mouth me behind my back, they may. But in terms of complaints or anything formal --

Q. I'm asking whether they have filed habeas corpus petitions alleging your ineffectiveness.

A. I'm actually aware of three. One was withdrawn voluntarily. I think two others that I'm aware of that I can recall.

Q. Would it surprise you to know that there may be seven or eight of those out there?

A. You know, it's possible, but I don't really remember that number.

THE COURT: Is there any attorney who does **[36]** defense work who has not had a former defendant claim that they received ineffective assistance of counsel?

THE WITNESS: There may be one, but I haven't met them.

BY MR. WITMER:

Q. When you're representing clients who face substantial punishment, those allegations occasionally just come with the territory, don't they?

A. Absolutely, and they should. If I've failed to do something I should have done, I encourage clients to bring that forward. I make the same mistakes every other human being makes and I've lost to every prosecutor that I know. I lose cases. Experience doesn't make me a winner of every case I try. If losing made me better, I should be wonderful at this point.

Q. Mr. Cooley, with respect to Petitioner's Exhibit to those ABA standards, let me go back there for a moment. You've indicated that there are some things in those standards that even you do not believe should bind counsel in the context of their representation of a capital defendant; is that correct?

A. Yes, there's one particular area.

THE COURT: What is that?

THE WITNESS: That is, and this is both my belief as to the standard and certainly as to my **[37]** practice. Approaching the victim's family, to me, is both unwise and often inappropriate. The ABA standard suggests that's an alternative and where it can be, it should be pursued. I guess I agree to the extent if you've got somebody who is open and anxious for you to approach them, you certainly should do that.

THE COURT: I take it the idea there is it may be possible in developing a defense strategy to, in a capital case, to obtain a belief on behalf of the victim's family that capital punishment should not be imposed in this case, which may influence the prosecutor and/or the jury.

THE WITNESS: It's helpful, perhaps, in the negotiation for life as opposed to being exposed to the death penalty.

THE COURT: It doesn't probably help once he goes to trial.

THE WITNESS: I don't know of a judge that will let a person get on the stand for either side and say I think this person should be put to death. It shouldn't be.

THE COURT: Just to be precise then, the idea there would be then in terms of negotiation with the

Commonwealth's Attorney, if you had the victim's family sort of on your side, saying, we think life is **[38]** appropriate in this case, then that would be helpful.

THE WITNESS: It would be, yes, sir.

THE COURT: But you personally think sometimes that's inappropriate to even go that way.

THE WITNESS: I do personally and I think it was a rarity until very recently that we even considered that. That's a very recent approach by counsel.

BY MR. WITMER:

Q. Mr. Cooley, you provide in your affidavit in this case a list of things that you believe counsel should do. Do you know for a fact whether counsel did any of those things in this case?

A. I do not. I have specifically not read the transcripts. I don't know. My testimony relates to just what I've been asked to testify to.

Q. Mr. Cooley, would you agree with the statement that there is a wide range of performance that could constitute effective assistance of counsel?

A. Yes, I would.

Q. Have you previously testified that your view of counsel's duty in a capital case is stricter than that which the Sixth Amendment requires and which is required by Strickland?

A. Do I personally think that; absolutely. The capital cases are different when you're dealing with a **[39]** human life. It is --

THE COURT: I think the question though, as I understand it, is it your view that your own personal view of what counsel's responsibility is, is likely

stricter than what may be required by the constitutional standard.

THE WITNESS: It is and it's stricter than the bare minimums that I was asked to describe here.

BY MR. WITMER:

Q Just a few more and I'll wrap up, Your Honor.

Hypothetically speaking, Mr. Cooley, if an attorney, faced with a client who had apparently committed a terrible crime, a client with a long history of violence, who was unable to find substantial mitigating evidence, decided to argue that his client was so violent and disturbed that the jury should spare his life so he could be studied by scientists, if you were in that attorney's position, would you make such an argument?

A. No.

Q. Would you be surprised to find the attorney who made that very argument was found not to be ineffective?

A. I don't know what else he argued or what else they presented. If that was the only argument --

THE COURT: Let me ask you this, Mr. Cooley. **[40]** Is it your experience -- let me ask you your personal experience. In every capital case that has gone to a sentencing phase that you've handled, how many would that be?

THE WITNESS: To sentencing phase would probably be 10, 11. Trial stage would be around 30.

THE COURT: I guess even at the trial stage, you would have prepared for the mitigation evidence in the sentencing phase.

THE WITNESS: In all 62 cases, I prepared for mitigation.

THE COURT: In all of those 62 cases, have you ever taken the position that there was no mitigating evidence that you would present, that is, that your argument would simply be, perhaps as counsel suggested, that either life in prison was more punishment than death or that the person could be studied by science because of their violence or some other defense in the sentencing phase that did not involve the personal characteristics of the defendant?

THE WITNESS: I have to answer this way. It's possible, 20, 25 years ago, I may have had a case where that decision was made, that there was nothing. By 2000, 2001, there's not a chance that I would have approached it with no mitigation presentation.

[41] THE COURT: Let me ask you this. You, I take it, have had cases in which there is a strong question of guilt or innocence, at least from a defense point of view.

THE WITNESS: Yes, sir.

THE COURT: Perhaps a largely circumstantial case?

THE WITNESS: (Indicating yes.)

THE COURT: In which you vigorously dispute guilt.

THE WITNESS: Yes, sir.

THE COURT: Is there a problem then in presenting mitigation evidence after the jury has found the defendant guilty of first degree murder?

THE WITNESS: No, sir, none. They have made a decision that on this occasion, this defendant did whatever heinous act is alleged. What mitigation is all about is showing them that this person has other

redeemable qualities, other things that either endeared him to folks or were acts of kindness or whatever, or things that explain how he got to this point, whether that was from abuse, whether it was an impoverished background that led to some of the things involved with that. You are offering to the jury an explanation of how this person got to this point and a justification **[42]** for them to select life without parole as opposed to a death penalty. So either thing they pick, of course, is horrendously onerous and it's important to be able to explain to the jury that this person has redeemable qualities or at least to explain to them, I think all the research shows that jurors want an explanation. How did he get to this point, why did this happen in this particular context. If you can show the jury that there are favorable things about this person, things that would cause them to want to impose the lesser of the two very onerous choices, you're not asking them to let the person go free. You're asking them to impose a lifetime in prison.

THE COURT: Is it your opinion that that ability to argue mitigating factors even in light of the jury's finding of guilt of a terrible crime somehow makes the jury mad or more likely to impose the death penalty?

THE WITNESS: No, sir. If it's done right, the trial judge and counsel will explain to the jurors from the beginning what the process is. There are ways -- there are often discussions between attorneys as to if I have done the primary presentation in guilt/innocence as one of the two or three or four attorneys involved in the case and my arguments have **[43]** been soundly rejected by the jury, then perhaps the second or third or fourth

attorney should be the primary presenter in the mitigation case. But I think if attorneys present well, if they present their cases fairly, jurors aren't turned off. They understand you're making an argument based on your perception and the defense's perception of law. Generally speaking, I don't think they are affected by the fact you may play some role in the mitigation or second stage of penalty.

Absolutely, the mitigation evidence still has to be presented. In fact, it's there for that very reason. The first issue is, did it happen on this occasion, what does that jury think? If they find beyond a reasonable doubt the person is guilty, they are supposed to be looking at all of the history and background, aggravators and mitigators, and making the determination. You're just facilitating their making that decision.

BY MR. WITMER:

Q. Are you aware of Florida v. Nixon and the holding of the Supreme Court?

A. Give me the facts and I'll tell you.

Q. Are you aware that the U.S. Supreme Court has held that an attorney may reasonably decide not to present inconsistent positions?

[44] A. I am aware.

Q. Let me ask you this. In the case of Leroy Malvo, you decided to do obtain the services of Ms. Carmeta Albarus, did you not?

A. She was one of three investigators that we were granted by the Court.

Q. Did Ms. Albarus assist you by putting on a mitigation case based in part on her opinion that Mr. Malvo was somehow acting out what he saw in the movie, The Matrix?

A. The Matrix was a part of the case and to the extent that it was one of hundreds of issues relating to the indoctrination of Lee Malvo, yes, I think that would be true. Ms. Albarus had a person who worked for her who kind of did a review The Matrix and there were a lot of similarities. It was something that the evidence showed Lee had watched hundreds and hundreds of times.

Q. Let me ask you the last two questions. Are you aware of whether the circuit court in Winchester had video conferencing capability and would allow them to take testimony from an out-of-country witness?

A. I would be shocked if they did. It's something that can be brought in. It's an expense, but can be brought in. I would not think that's part of any regular expectation of any court in Virginia.

[45] Q. Lastly, if an attorney in Winchester, Virginia, were trying a capital case and were presented with evidence that would support a defense or a mitigation case based upon The Matrix, could that attorney reasonably decide not to present such a case because a jury in Winchester wouldn't accept it?

A. If the only defense was, my client once watched The Matrix and now he's acting that out, I think that would be a reasonable expectation of counsel. But you're taking that very much out of context. The Matrix was part of the indoctrination defense which was part, in the Malvo case, part of guilt or innocence on sanity. The issue was whether Lee had been so indoctrinated as to not know the difference between right and wrong and was following the direction of the person who had, in the lay term, brainwashed him.

Q. Could an attorney reasonably reject in it's entirety an effort to present information about The Matrix as part of a mitigation case because of concern that a jury would not find it credible?

A. In the context of any case, an attorney could reasonably reject any piece of evidence, including basing the mitigation case The Matrix, yes.

MR. WITMER: Thank you, Mr. Cooley.

THE COURT: Any further questions of the [46] witness?

REDIRECT EXAMINATION

BY MR. ROSKOSKI:

Q. Mr. Cooley, you just told us an attorney can make a reasonable decision to reject any reasonable piece of evidence. Can you contextualize your opinion or tell us more about what happens when you make a series of those decisions and find yourself deciding to present no mitigating evidence at all?

MR. WITMER: Objection, Your Honor. It calls for speculation.

THE COURT: I'll overrule the objection.

Go ahead.

THE WITNESS: I think always the goal should be to put on mitigation evidence.

THE COURT: Mr. Cooley, I guess that was my previous question to you. Your view is that you always present some mitigation evidence about the characteristics of the defendant. Is that sort of your general take on the matter?

THE WITNESS: Yes, sir. Jurors are looking for something they can hang their hat on that justifies them picking between the lesser of these two very harsh penalties. If you don't give them anything, you

are really limiting their ability to go in that direction. [47] You may have witnesses that are a mixture, that may even have more negatives than positives to say, but as a general rule, if you don't have anything else, you would want to put those on. If there's nothing positive, nothing there positive to put on, then the jurors are going to say, there must not be anything at all out there.

THE COURT: Then you only have the argument, life is really worse than the death penalty here, make him suffer, spend the rest of his life in prison or some similar argument.

THE WITNESS: That's correct.

THE COURT: Do you believe that's ever an effective argument?

THE WITNESS: If you rank them, have there been cases where jurors have come back? You don't know if that was a persuasive argument, but that was the only argument made and juries have come back and given life, but you don't really know what their reasoning was. I think that's well down the list of options for a defense attorney in a capital case.

BY MR. ROSKOSKI:

Q. Mr. Cooley, you testified about how your duty to investigate changes based on how reasonable it is to access witnesses. You also told us that you have [48] investigated cases that involve foreign witnesses in at least one other case. What country did you find those witnesses in?

A. Jamaica.

Q. You testified that sometime you may not get a mitigation specialist. If a mitigation specialist has been appointed, is it reasonable to use their services?

A. Certainly.

Q. When they prepare their report, would it be reasonable to ask them to confine their written report to things that might be helpful to you and convey unhelpful things to you orally?

A. As long as it's supplied to you, how you want it and how they provide it, I suppose, is purely between counsel and the investigator.

Q. One last question. You talked to us about trying to present a consistent position between guilt/innocence and the penalty phase. Positive aspects of the defendant's character, good interaction they've had had with other people, people that love them and care about them, are those generally consistent with an innocence defense?

A. They could be consistent with both types. There are times you come in and you're pleading not guilty, but you're conceding guilt because that's how you get to **[49]** the jury being in a penalty phase as opposed to the judge. But either way, they're consistent with a proper presentation by counsel. There's nothing inconsistent about that with an innocence defense.

THE COURT: Anything further?

RECROSS-EXAMINATION

BY MR. WITMER:

Q. Mr. Cooley, if you locate a mitigation witness but that witness has in their possession other information of a very damaging nature to your client, such that opening the door by putting this witness on would allow the prosecution to present additional evidence in aggravation, you would consider, under the circumstances, not putting that witness on, would you not?

A. I certainly would. If that was the only witness I had, I might opt to put them on and get what little mitigation there is, even though it's outweighed by the aggravating information. If I've got ten witnesses and many of them are all favorable or three-quarters favorable, then I would probably opt to not put that witness on.

MR. WITMER: Thank you.

THE COURT: Thank you, sir. You may step down.

[50] This witness will be excused.

You may call your next witness.

MR. ROSKOSKI: Petitioner would next call William Stejskal.

WILLIAM STEJSKAL, CALLED AS A WITNESS
BY THE PETITIONER,
SWORN
DIRECT EXAMINATION

BY MR. ROSKOSKI:

Q. Doctor, would you state and spell your name for us, please?

A. Certainly. It's William J. Stejskal. Stejskal is spelled S-t-e-j-s-k-a-l.

Q. What is your profession, Dr. Stejskal.

A. I'm a licensed clinical psychologist.

Q. Are you licensed in Virginia?

A. Yes.

THE COURT: Let me interrupt you. If you'd speak directly into that microphone, please. Thank you.

BY MR. ROSKOSKI:

Q. For how long have you been licensed in Virginia?

A. I've been licensed in Virginia since 1989.

Q. What does your practice include?

A. My practice has a few different parts. I have a private practice in Woodbridge, Virginia, where I conduct individual psycotherapy with adults and **[51]** adolescents. I also conduct psychological and neuro-psychological evaluations on clinical referral from physicians. I also conduct forensic evaluations. I'm also employed as a member of a judicial commission in the D.C. Superior Court.

Q. In 2000 and 2001, how were you employed?

A. I was employed as the director of psychology and the director of the forensic psychiatry clinic at the Institute of Law, Psychiatry and Public Policy at the University of Virginia.

Q. Did the institute have a contract at that time with the Attorney General's office?

A. With the Attorney General's office and with the Department of Mental Health.

Q. What was that contract for?

A. The contract was to provide training in conducting forensic evaluations, training that would be presented to psychiatrists, psychologists and some cases social workers, around the State of Virginia so that they would be equipped through their local courts and local community services board to provide forensic evaluation services in criminal cases.

Q. You've mentioned that you do forensic consulting work yourself. When you do so, do you work only for the defense or for the prosecution as well?

[52] A. No, I also work for the prosecution on occasion.

Q. Were you appointed to serve as an expert in Edward Bell's case?

A. Yes, I was.

Q. When were you appointed?

A. I believe I was contacted by Judge Hupp in August of 2000, asking about my availability to be appointed as an expert under the Code Section pertaining to forensic mental health evaluations for purposes of mitigation in capital cases.

Q. Is that Code Section the one commonly referred to as 3:1?

A. Yes, 19.2-264.3:1 is the complete reference.

Q. About how many times have you served as a 3:1 expert, sir?

A. Between 35 and 45 times.

Q. Dr. Stejskal, what do you understand your role as a 3:1 expert to be?

A. The Code Section is fairly clear that the 3:1 expert is to conduct an evaluation of the defendant and then to consult with the defense attorneys in assisting them in preparing and presenting evidence in mitigation pertaining to the defendant's character, history and mental health status.

Q. That evidence in mitigation that you just **[53]** described, do you understand your obligation to refer to generating that evidence broadly and generally?

A. No. The 3 -- scope of the 3:1 expert's appointment has to do particularly with matters pertaining to the defendant's mental health status around the time of the offense or their psychological development earlier in their life that gave rise to who they were, if you will, on the day of the offense. There's a much broader domain of potential

mitigation evidence. The 3:1 expert is tasked with doing an evaluation of what would be a subset of that broader universe of mitigation evidence.

Q. Are you familiar with mitigation investigators or mitigation specialists?

A. Yes.

Q. Have you ever worked on cases in which they were appointed?

A. Many, many times, yes.

Q. Generally, who gets appointed first, you or the mitigation specialist?

A. In my experience, the mitigation investigator had been appointed and had been working on cases where I'd been involved, sometimes several months before I was engaged.

Q. How did you coordinate your work with them?

[54] A. Generally, I will speak with that investigator regarding who they've spoken with, their impressions of the defendant. I will speak with them generally to try to get a sense of what subset of parties they've interviewed would be useful for me to interview in my role as a 3:1 expert.

Q. Do you interview everyone they interview?

A. No, I've never done that.

Q. Do you ask about everything they ask about?

A. I don't understand the question.

Q. I'm sorry. Are you aware of the general sorts of things that mitigation investigators tend to ask witnesses when they interview them?

A. Yes, generally.

Q. Do you ask the same set of questions?

A. I would have to say no. In my experience, mitigation investigators really cover the waterfront

and ask about a great many different subjects, some of which overlap in what I'm interested in as a 3:1 expert. But there are many different subjects and collateral sources they review and investigate that I really don't have anything to do with.

Q. Could you give us an example of something that a mitigation specialist has investigated that you would not look into?

[55] A. The one recent example involved an adult Vietnamese male, who early in his life when the family was still residing in Vietnam, following the fall of Saigon in 1975, had been forcibly relocated to a rural collective by the Communist government and subjected to a variety of harsh conditions. In that case, the mitigation investigator went to Vietnam with an interpreter and a cultural expert to talk to people who still lived in the village who were present during those years who would be in a position to talk to them, firsthand knowledge, about what the family experienced, what conditions were like during the defendant's formative years and who would be in a position and willing to testify at trial.

Q. Do you recall who the attorneys were you worked with on Mr. Bell's case?

A. Yes, Mr. Williams and Mr. Fischel.

Q. Since Mr. Bell's case, have you had occasion to work with those attorneys again?

A. I have, with Mr. Williams. I don't believe I've had another occasion to work with Mr. Fischel.

Q. In that other case, was a mitigation specialist used?

A. As I sit here right now, I don't recall.

Q. Now, Dr. Stejskal, as a 3:1 expert, what is your **[56]** responsibility with regards to the

Commonwealth's evidence in aggravation? Is it your job to investigate that?

A. Generally, no. The one caveat to that though would be that if the Commonwealth has given notice of their intention to put on evidence that goes to future dangerousness as a potential aggravating factor, I'll certainly review information concerning the defendant and their background, their behavioral history, their criminal history, to see what can be learned about whether this is a scientifically supportable basis for rebutting that proposition of future dangerousness.

Q. Are you aware of lists of witnesses in aggravation that are sometimes supplied by Commonwealth attorneys?

A. Yes.

Q. Do you use that list as a resource to identify people that you're interested in interviewing as a 3:1 witness?

A. Generally no, I haven't.

Q. I'd like to talk to you now about the work you did when appointed to Mr. Bell's case. Did you perform a 3:1 investigation of Mr. Bell's case?

A. I performed a 3:1 evaluation, but not an investigation, yes.

[57] Q. Did you prepare a report in Mr. Bell's case?

A. Yes, I did.

Q. I'm going to put up on the ELMO here. Dr. Stejskal, you've just been handed a document. Is that the report you generated in Mr. Bell's case?

A. Yes, it is.

Q. Thank you. Did you administer psychiatric tests to Mr. Bell?

A. I didn't administer psychiatric tests. I administered several screening tests for neuro-psychological impairment.

Q. What were those tests?

A. I administered a Bender Gestalt test, a Clock Drawing test, a Trail Making test and the Raven's Progressive Matrices.

Q. Why did you choose those tests to administer?

A. Those are screening instruments, as I mentioned, to evaluate the possibility of brain damage or neuro-psychological impairment. Early in my initial interview with Mr. Bell, he mentioned he had suffered a closed head injury with loss of consciousness as a teenager when he was struck in the head with a golf club. It's my practice when there's that sort of history, that sort of marker for neurological or neuropsychological impairments, I will do screening **[58]** instruments to evaluate the possibility that there's lingering impairment.

Q. Based on the screening instruments you administered, were you able to find out if there was neurological impairment or brain damage?

A. No, I wasn't.

Q. Why not?

A. Mr. Bell approached the test with insufficient motivation to do this best. When an individual doesn't try their best on these tests and score as he did, which is really below the lowest possible scores for people who have impairment, they don't provide any useful information, one way or another, respecting any residual damage or impairment.

Q. Can you tell us what you mean by insufficient motivation to give their best efforts?

A. Certainly. The generic terms would be malingering or faking bad when an individual is motivated for one of several different reasons not to do their best on the test, but to present themselves as more impaired than they actually are.

Q. What are some of the possible reasons why someone might exert less than their best interests?

A. Sometimes because the person is making a calculated effort to appear to have a certain disorder **[59]** or syndrome in order to create a false impression in the eyes of the doctor and eventually in the court for the trier of fact. Other times, a person will appear to be doing poorly intentionally when, in fact, it's an issue of poor comprehension. The most common motivation that I've encountered in forensic evaluations has to do with a person performing badly in sort of a cry for help, try to present themselves or depict themselves as less able, as so upset, as so stricken by their circumstances that they virtually can't do anything effectively.

Q. Were you able to form an opinion as to why Mr. Bell might have exerted less than optimal effort?

MS. BALDWIN: I'll object to that. He's not an expert witness and that's not in his original report. This is a lay witness.

MR. ROSKOSKI: May I respond to that?

THE COURT: Yes, sir.

MR. ROSKOSKI: It's factual history testimony about the actual evaluation he did do and contextualizes what he wrote in the report.

THE COURT: He did, but I guess he did not express there an opinion.

MS. BALDWIN: He's asking for an opinion that goes way beyond.

THE COURT: Yes, ma'am. Wait just a second. **[60]** He hasn't expressed that opinion and the state objects because if the opinion is meant to be credited by me, then it hasn't previously been disclosed.

MR. ROSKOSKI: Your Honor, we're offering it not to be credited on it's face, but merely to explain why he wrote what he wrote as a historical matter.

MS. BALDWIN: I think that's the exact same thing. They're asking for him to expound on what is in the report that was presented to trial counsel and they're now asking him to go beyond the bounds of a lay witness and they're now asking him to give this Court an expert opinion and asking for this Court to accept that.

THE COURT: I do think it has doubtful relevance. I mean, if this was not conveyed to trial counsel, what is it's relevance?

MR. ROSKOSKI: Your Honor, we will catch up very shortly with the question of what he did communicate to trial counsel.

THE COURT: Why don't we do that and then we'll see the possible relevance?

BY MR. ROSKOSKI:

Q. Dr. Stejskal --

THE COURT: Just move this along because we do need to move along, I've read the report and read it **[61]** before today. I'm familiar with it. I think it's important, rather than go through the report, I know what it says, to get into what he conveyed to counsel. For example, there is in the report a statement that by the end of your meeting with trial counsel, he had

conveyed the intention not to use your testimony during the penalty phase.

Is that accurate?

THE WITNESS: Yes, sir.

THE COURT: Then you went on to say this decision followed our lengthy discussions of the issues.

I think it's correct to say that in your report, and I assume in your discussions, you were, frankly, somewhat negative about the value of any mitigation evidence that you had disclosed, is that correct, that you had uncovered in your evaluation?

THE WITNESS: That's not exactly correct, Your Honor.

THE COURT: Explain it, if you would.

THE WITNESS: I was pessimistic about the viability of using me as a vehicle or conduit for presenting mitigation evidence at the penalty phase, for the reasons that I laid out in my report and that it would run the risk for cross-examination, as often happens, would turn my direct testimony on its head and **[62]** go to factors in aggravation.

THE COURT: How do you otherwise present mental health testimony, if not through an expert?

THE WITNESS: You're correct. If you add the qualifier mental health evidence, then you're right, then I advise against using me to present mental health evidence. Frankly, as I discerned it, there wasn't enough pertinent, persuasive mental health evidence to warrant introducing the risks of presenting me as a witness. There certainly was mitigation evidence that could have been presented through lay witnesses and that was the other portion of our discussion.

THE COURT: But in your report, for example, you say that -- you're pessimistic about even other evidence, other than expert testimony. For example, you say there's a double-edged sword of a history of child abuse. In your view, even if there had been such lay testimony about that, you cautioned against it, I take it.

THE WITNESS: No, I didn't, Your Honor. If my report isn't clear on that, I apologize for that. In the body of that paragraph where I referred to that example as introducing a double-edged sword, I was speaking within the context of using the mental health expert as the vehicle of that testimony where on **[63]** cross-examination, they could correctly be asked whether that history also constituted a risk factor for future dangerousness and the honest expert would have to say yes.

THE COURT: You are obviously giving advice to the attorneys, tactical advice, in regard to their mitigation evidence. Do you see that as your role? You're giving him advice about what evidence they should and shouldn't present. Is that part of your role?

THE WITNESS: It is, Your Honor, as I understand the Code Section. I'm required to assist the defense in the preparation and presentation of mitigation evidence and certainly part of my role is to contribute to that process in the way that I did in this case.

THE COURT: I know, but it's one thing to present to the attorneys your views as to the defendant's mental health issues, but I mean you're advising them really about -- for example, you say opening the door to the Commonwealth's case.

You're giving them tactical advice here about how to try this capital case, aren't you? I'm not suggesting that that's wrong, but I'm just wondering if that is your role. Is that common in your position, in this situation?

THE WITNESS: I believe it is common among **[64]** experienced evaluators who have a lot of this sort of practice where because of the fact they have often done in some cases dozens more capital cases than the attorneys, they have an experience base in terms of the way they've seen issues addressed, the way they've seen issues be misdirected in various ways. They're in a position to offer that sort of tactical information for the attorneys to consider.

THE COURT: Sort of in summary, you advised them, number one, don't -- in Mr. Bell's case, do not introduce a mental health expert testimony and number two, you advised them that he apparently is malingering on his test and that is some of the negative evidence that would come out with a mental health expert. But the bottom line was, your advice to them was don't use a mental health expert in Mr. Bell's case.

THE WITNESS: That's essentially correct.

THE COURT: I'm sorry. Go ahead.

BY MR. ROSKOSKI:

Q. But Dr. Stejskal, was your advice to them, don't present any evidence in mitigation at all?

A. Not at all, no.

Q. Did you discuss with them themes in mitigation or mitigating evidence that could be presented without a mental health expert?

[65] A. Certainly. There were a few different domains. There were issues pertaining to Mr. Bell's

childhood experience of having parents coming and going in and out of the his life. There was questions of the physical hardship and abuse he experienced at the hands of his father, which certainly could be things that could have been presented to the jury by people who were there and who had firsthand knowledge of that. But I think most importantly were dimensions of his functioning and life as an adult in this country that could have been presented in a manner that would have -- and this gets to one of the main purposes of mitigation evidence -- depicted Mr. Bell as the living, breathing human being that he is; that he had attachments, relationships, children he was attentive to and financially involved with and this sort of information could have been presented, I think, potentially very effectively and very persuasively by certainly the lay witnesses that were interviewed in the course of my evaluation and other witnesses that clearly were out there to be interviewed.

THE COURT: Did it -- in your discussions, and you've mentioned the theory or doctrine of double-edged sword. Was it ever discussed that this possible mitigating evidence concerning Mr. Bell's **[66]** relationship with his children might be counterproductive or a double-edged sword because of the victim's family situation?

THE WITNESS: I believe that was discussed, if not in that meeting, then in other conversations I had with Mr. Williams.

BY MR. ROSKOSKI:

Q. If this evidence, this mitigating evidence that you just discussed, is not the sort of thing that

should come through a mental health expert, how did you find out about it?

A. In conducting the evaluation that I was appointed to do, my --

MS. BALDWIN: Your Honor, I'm having trouble hearing.

THE COURT: Your voice is a little low. You need to speak up right into that mic.

THE WITNESS: In the course of the evaluation that I conducted, I was assisted by my forensic psychology fellow, Dr. Connie Beck. Dr. Beck interviewed members of Mr. Bell's family as part of the evaluation that I was appointed to perform.

BY MR. ROSKOSKI:

Q. Was she looking for general mitigating evidence?

A. No, she wasn't. She was attempting to elicit **[67]** information that was relevant to his psychological development of the family history as it affected and impacted his psychological development during his formative years, along with information about his functioning as an adult.

Q. And yet, despite the fact that that's all she was looking for, she found mitigation anyway?

A. First of all, there's often considerable overlap, but in talking to members of his family, she certainly heard them describe Mr. Bell and his relationships with them, his relationships with his children in essentially positive terms.

Q. Now, you told us that you advised Mr. Williams to put on mitigating evidence through lay witnesses. How did he respond to that advice?

A. He responded in a couple of different ways. He certainly appeared during the meeting that we had in December to concur with my assessment, my analysis of the relative value of pursuing a lay mitigation case, as opposed to a mitigation case where a mental health expert played a pivotal role. He also indicated there would be a need to get in touch with and identify potential lay witnesses to begin to put that lay mitigation case together.

Q. Did he seem prepared to do that?

[68] A. At the time we met on December 14, no.

Q. How far away was the trial when you met with him?

A. I can't call to mind the exact date of the trial, but I believe it was mid to late January, four or five weeks downstream from that meeting.

Q. What was your reaction to that fact?

A. I was surprised by what I was learning during that meeting, that apparently, Dr. Beck was the only one in the room who had had any substantive conversations with members of the family regarding Mr. Bell's background, regarding his relationship as an adult to his children, to his family members. So I was surprised.

Q. Did you or your assistant offer to help with that process at all?

A. Yes. As Mr. Williams was making it clear by his comments that he was basically unfamiliar with the individuals or with the themes that could be laid out, Dr. Beck did leap into the breach and offer to assist in the process of putting together and connecting Mr. Williams to lay witnesses who would be in a position to testify in the penalty phase.

Q. Did she actually wind up doing so?

A. She attempted to. There was discussion in that meeting of a list of names and phone numbers of friends, **[69]** acquaintances, both in this country and elsewhere, that had been apparently prepared by the family for prior counsel in this case and it was an indication in the meeting that this document, which apparently was in the records trial counsel had, would be sent to Dr. Beck so that she could review that list with Marjorie Bell, I believe. She did follow up with a phone call to Ms. Bell, to Marjorie Bell, about the possibility of additional witnesses, but I don't believe she ever received any fax of the names to review with her.

THE COURT: The report, do you wish to introduce that, the report dated January 7, 2001? It's already part of the record, I guess.

MR. ROSKOSKI: We have no particular need to move that into evidence.

THE COURT: The state will want to do it. Why don't we go ahead and put it down as Petitioner's Exhibit #4.

(Petitioner Exhibit #4 was marked for identification and admitted into evidence).

BY MR. ROSKOSKI:

Q. Dr. Stejskal, later that same day, did your assistant write a letter to Mr. Williams?

A. Yes, she did.

Q. The document you have just been handed, is that **[70]** the letter?

A. The first two pages of it that was just handed to me are that letter.

Q. Did you proofread and approve that letter?

A. Yes, I did.

Q. Did the institute routinely write letters memorializing conversations with attorneys and conveying information to them?

A. Generally not.

MR. ROSKOSKI: We move for this letter to be admitted.

MS. BALDWIN: No objection.

THE COURT: It will be admitted as Petitioner's Exhibit #5.

(Petitioner Exhibit #5 was marked for identification and admitted into evidence).

BY MR. ROSKOSKI:

Q. Dr. Stejskal, could you look at page one in the last paragraph and read to us the portion beginning with the words, "I also asked Marjorie."

A. The entire paragraph below?

Q. Until the works, "check with her."

A. "I also asked Marjorie about any witnesses she might be able to produce for you as witnesses favorable to Eddie. She indicated that she and Tracy had prepared [71] such a list with telephone numbers for the first lawyer in the case, Mr. Boyd. Did you receive any records from Mr. Boyd? If so, you may want to check and see if you can find such a list."

Q. Did Mr. Williams ever respond to your interested inquiry in that letter?

A. No.

Q. Would you take a look at page two for me, please? In the first full paragraph on page two, there's a section in the middle towards the end that begins, "it is my understanding that the Courts regularly appoint"?

A. Yes, I see it.

Q. Would you read that to the end of the second question, please?

A. "It is my understanding that the Courts regularly appoint investigators to work with defense attorneys in capital cases. Are there any investigators appointed in this case? Could these investigators possibly help you in locating witnesses?"

Q. Did Mr. Williams ever answer those questions for your assistant?

A. No, there was no response from Mr. Williams to anything proposed in this letter.

Q. Were you aware of any investigators proposed in Mr. Bell's case?

[72] A. At the time of my original involvement in this case, no.

Q. Did you have get any reports from investigators?

A. No.

Q. Dr. Stejskal, you were just discussing with His Honor a little while ago the pages at the end of your report in which you advised Mr. Williams about the pro's and con's of calling you. Do you normally write that advice in your reports?

A. No, I don't.

Q. Why did you do so in this case?

A. I wrote it in this case, as I have in one or two others, when I was specifically asked by counsel to include that analysis and those recommendations in the report.

Q. Were you asked by counsel in this case to do that?

A. Yes.

Q. Why?

MS. BALDWIN: Objection, speculation.

THE COURT: If you know.

THE WITNESS: I know what Mr. Williams told me in the course of the conversation.

THE COURT: Go ahead.

THE WITNESS: He indicated he was hoping the [73] report would include language that would provide clear support and justification for what he believed would be his eventual decision not to call me to testify at the penalty phase.

BY MR. ROSKOSKI:

Q. Did you tell Mr. Williams that you had definitively ruled out the possibility Mr. Bell might suffer from brain damage?

A. No.

Q. Did you tell him you had ruled out possibility that Mr. Bell might be mentally retarded?

A. No, I didn't tell him that I conclusively ruled that out.

Q. Did you tell him Mr. Bell couldn't even have impaired intellectual functioning that fell just short of mental retardation?

A. No.

Q. Did you suggest to him anything about what Mr. Bell's IQ might be?

A. I did. I told him my impression, based on Mr. Bell's vocabulary, his level of conceptual thinking and abstract reasoning, that I thought he was similar to other incarcerated males in the United States correctional system and probably had an IQ sometime between the upper 70's to mid 80's.

[74] Q. Is that a high score?

A. No that's a low score. That's one standard below the mean of 100.

Q. Did you ever tell Mr. Williams Mr. Bell had an average criminal mentality?

A. No, I don't even understand what those terms mean, used in that combination.

Q. Did you ever tell him that Mr. Bell was a sociopath?

A. No.

Q. In fact, is sociopath a word you would ordinarily use?

A. No, sociopath is not part of the nomenclature of my field. The closest term would be psychopath or having a psychopathic personality.

Q. Did Mr. Bell present as being a psychopath?

A. No.

Q. Your report lists some people you interviewed. Can you tell us were there any family members or close acquaintances of Mr. Bell that you were aware of but did not interview?

A. Yes.

Q. Who?

A. Primarily, there were siblings. In Winchester, there were a brother, Wilbur, and two sisters, Diane and **[75]** Donna; Marcia, in Jamaica; Dolly, who was living in the United Kingdom; Loretta, in Canada. I believe there was a brother, Croz, and a sister, Rona, living in Chicago. And other family members would include his father and his mother; Dawn Jones, the mother of one of his children; Joanne Nicholson, the grandmother of three of his children. These were people that I was aware of at the time.

Q. In your experience, whose job is it to interview witnesses like that?

A. It really all depends. If there was, speaking hypothetically, if there was reason to believe one of those individuals had particular information that was relevant to the scope of my evaluation as a 3:1 evaluator, I would have attempted to interview them. That wasn't the case with these individuals. In my experience, such family members would be interviewed by a mitigation investigator, a private investigator or by trial counsel, depending on the resources they had available to them in the case.

Q. Did you or your assistant interview anyone in Jamaica?

A. Yes, Dr. Beck interviewed, by phone, Nelly Hutchinson Walker, the oldest sibling, Mr. Bell's oldest sister.

[76] Q. Was she able to get information from Ms. Hutchinson Walker?

A. Yes, apparently so. The initial phone calls with Ms. Walker were quite productive in beginning to lay out information about the family's background, Mr. Bell's early childhood, the kinds of behavior he did exhibit and also the kind, more importantly, the kinds of behavior he did not exhibit with respect to criminality and delinquent behavior. Unfortunately, Ms. Hutchinson Walker died suddenly in early December and was no longer available as a source of further information.

Q. Apart from the tests and interviews, were you able to review any records relating to Mr. Bell?

A. Yes.

Q. Were there any records you wanted to review but couldn't?

A. Yes. The academic records from Jamaica; medical records, at the very least, from the lengthy hospitalization he endured following his closed head injury when he was struck by a golf club; occupational employment records from Jamaica. None of those were available.

Q. What about his criminal record, his NCIC report?

A. We didn't receive a print-out of the NCIC report for this country. Nor did we receive any information at [77] that time, in 2000, concerning any criminal or delinquent behavior in Jamaica.

Q. Do you normally receive that sort of information from attorneys that you consult with?

A. Yes, usually at the outset of my involvement.

Q. But you did not get it here.

A. No.

Q. Did you receive any reports or material from a mitigation investigator or a fact investigator in this case?

A. No.

Q. Thank you.

MR. ROSKOSKI: I have no further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. BALDWIN:

Q. Dr. Stejskal, I'm going to hand you a document. Could you look at that for a minute? It's a print-out from the web page from the Institute of Law, Psychiatry and Public Policy. Do you see it?

A. Yes, I do.

Q. It specifically identifies -- the particular page print-out describes what is captioned "capital

mitigation services" by your organization; is that correct?

[78] A. Yes.

Q. The first part of it says that -- it essentially identifies the services that you provide as a 3:1 expert, isn't it?

A. No, it's not.

Q. It's not?

A. No, ma'am.

Q. Doesn't it say Capital Mitigation Services?

A. It does say that.

Q. But it has nothing to do with your 3:1 expertise?

A. No, it does not.

Q. What is it describing?

A. This is a page that is available through a link at the Institute's website that was prepared by Janet Warren, a social worker on the faculty of the Institute, to essentially advertise her availability and through her, the resources at the Institute, to provide mitigation and investigation services in capital cases outside of Virginia.

Q. But your website says nothing about her, does it?

A. I'm sorry?

Q. The website does not identify her as identifying her services, does it?

A. This page doesn't. I honestly don't know whether there are other links that do.

[79] Q. If you would please look at the bulleted provisions on that. Would you please read the first bulleted provision? First of all, I will read to you the first paragraph that says, "the clinical faculty of the

Institute of Law and Psychiatry and Public Policy offers assistance to attorneys in the development of mitigation relevant to sentencing in cases of capital murder. These services include:" Did I read that correctly?

A. Yes.

Q. Would you please read the first bullet, service?

A. Certainly. The development of a comprehensive psychosocial summary/narrative, based upon extensive and multi-source research and interviews encompassing the life history of a defendant."

Q. Would you please read the second bullet service that says "the clinical faculty provides"?

A. "Evaluation of factors relevant to future institutional adjustment and a risk for violence."

Q. And please read the last three bulleted provisions, which are services.

MR. ROSKOSKI: Your Honor, we object. He's already testified these do not describe his services.

MS. BALDWIN: This is cross-examination.

THE COURT: Wait, ma'am. I'll ask counsel, **[80]** if they have response to any objection, because I might overrule the objection and then you wouldn't need to respond.

I am going to overrule the objection, but do you not have a copy for me?

MS. BALDWIN: Yes, Your Honor, I'm sorry. I got confused with what we were going to be able to use up here and I apologize.

THE COURT: Again, to speed matters along, which is essential in this case, if you'd like to introduce this as an exhibit?

MS. BALDWIN: Yes, I would, Your Honor.

THE COURT: It will be admitted as the Respondent's Exhibit #1.

MR. ROSKOSKI: Your Honor, we would object to introducing it as an exhibit. It was not provided on the exhibit list and it's hearsay.

MS. BALDWIN: This is impeachment, Your Honor.

THE COURT: I agree and I'll overrule the objection. It will be admitted and I can read it.

(Respondent Exhibit #1 was marked for identification and admitted into evidence).

Let me ask you this, Doctor.

Your institute does, obviously, provide [81] capital mitigation services; is that not correct?

THE WITNESS: That's correct, but a fulsome answer would be more involved.

THE COURT: Here's the question for you, Doctor. In your letter to counsel, you're giving them tactical advice. You're telling them what other witnesses they ought to use. The assisting professional with you interviewed a lot of family members. Why isn't this mitigation services? Why isn't this the same thing that any so-called mitigation expert would provide to defense counsel in a capital case?

THE WITNESS: (No response.)

THE COURT: Isn't that reasonably what defense counsel considered you were doing in what you advised them?

THE WITNESS: Obviously, I can't speak to what they understood. I can certainly speak to how I represented myself and respond to the question that was asked.

An evaluation performed under 3:1 of the Virginia Code would be subsumed under this menu, if you will, of a more comprehensive capital mitigation services. But it's actually, relatively speaking, a relatively narrow scope for the 3:1 evaluator and it doesn't include or encompass or really contemplate [82] certain of the items that are mentioned on Dr. Warren's web page.

THE COURT: Maybe it's more extensive in your view, but didn't you do each of the things that are listed in the website description? I mean, you did a psychosocial summary. You list it about Mr. Bell's background and history. You didn't do evaluation of future institutional adjustment and risk for violence. I don't see that you did that. But you did a psychological assessment and neuro-psychological testing when indicated. At least you gave some report about that, correct?

THE WITNESS: That's correct.

THE COURT: And you gave psychiatric examination and neurological assessment where indicated and you also consulted with them about mitigation testimony. I mean, your associate provided interview information and you advised them about what evidence they ought to present. I mean, are we just talking about, in your view, a "mitigation expert" would have, what? What's the difference between what you did and what a mitigation expert would or could have done?

THE WITNESS: I think the operative term that's represented in the print-out of the web page is the word comprehensive. The operative word that **[83]** distinguishes a 3:1 evaluation from a mitigation investigation is reflected in the word comprehensive as a modifier for the psychosocial history and summary. The 3:1 evaluation is circumscribed, if nothing else, by the domain of expertise of the evaluator, which is a forensic mental health professional. Because of that expertise and because of the language in the Code Section, my focus as a 3:1 evaluator is on matters that are pertinent either to the defendant's state of mind at the time of the offense or factors from the defendant's background that influence the person he had become by the time I was involved in the offense.

The broader universe of potential factors of mitigation includes the domain of the 3:1 expert, but in my experience is much broader in that there would be facts in evidence, that could be put on in evidence in a penalty phase of a capital case that would have very little to do with anything particularly relevant to mental health issues or to psychological issues, the sort of father he was, how he related to his children.

That would be the distinguishing feature. I would not say in this case I did a comprehensive psychosocial because that's not what I was tasked to do.

THE COURT: Would you say that the difference then was that you didn't give advice or **[84]** information concerning Mr. Bell's children as possible -- and his relationship with his children as possible mitigation?

THE WITNESS: That's correct.

THE COURT: But in fact, in your report, you talk about that, don't you?

THE WITNESS: Yes.

THE COURT: You say, talk about his relationship with his children. Mr. Bell was "all about his kids. When the children were infants, he would feed them in the middle of the night and provide much of their care. He loved taking the children fishing," so on and so on. It's all in your report. Why isn't that just exactly what you're talking about?

THE WITNESS: That's information Dr. Beck learned in the course of her evaluation.

THE COURT: What is special about somebody with the title "mitigation expert," they would have -- a mitigation expert would have found the same thing, wouldn't they?

THE WITNESS: They probably would have found the same thing, Your Honor, but what they also would have found, among other things, are additional potential witnesses who could have testified from varying perspectives about these matters, witnesses who really **[85]** would have had nothing particularly useful to say to me regarding any mental health issue, but who could have been very persuasive as lay witnesses with the jury on issues that we touch on in a passing mention in this report.

THE COURT: Go ahead.

BY MS. BALDWIN:

Q. Dr. Stejskal, you, I think, quibbled with the word comprehensive in your recent exchange with the judge. Please look at Petitioner's Exhibit 4,

which is a copy of your report. Do you have that before you?

A. I do.

Q. If you would please look at, it says, "Dear Mr. Williams and Mr. Fischel, "and then the second paragraph right at the beginning, the second paragraph. Please read that paragraph.

A. Certainly. This report is based on a broad range of information and evaluation procedures. This is a standard practice in capital sentencing evaluations since the Code of Virginia requires the evaluator to develop a comprehensive understanding of the individual's character and mental condition.

Q. So you told the attorneys you were doing a comprehensive evaluation, didn't you?

A. That's not what I said in that paragraph, no.

[86] Q. What you just said, you told them it was your job to develop a comprehensive understanding of the individual's character and mental condition?

A. I indicated in that sentence what the standard practice was under the Virginia Code Section.

Q. So are you telling the Court today that you told the attorneys this, but in fact, you really didn't do it? You can't possibly be testifying to that.

MR. ROSKOSKI: Your Honor, we'll object to badgering at this point.

THE COURT: I don't believe that's badgering.

You can answer the question, Doctor. You told them it was comprehensive, but why wasn't it comprehensive?

THE WITNESS: This may be me quibbling with my choice of words that I used in the report. My

objective in conducting any of these evaluations is to have my evaluation be as comprehensive as possible. In Mr. Bell's case, I was not able to fulfill that objective and I made this clear in my conversations with Mr. Williams.

BY MS. BALDWIN:

Q. This is what you said this in your report, but then you told the attorneys, I didn't really do a [87] comprehensive evaluation. Is that what your testimony is?

A. My testimony is I informed Mr. Williams my evaluation was not comprehensive in certain respects.

Q. You did three interviews with Mr. Bell, didn't you?

A. That's correct.

Q. That's what you stated in your report. You administered five psychological, pen and paper tests; is that correct?

A. Four or five, yes.

Q. One of which was the Raven's IQ test, isn't it?

A. The Raven's Progressive Matrices, yes.

Q. And your testimony this morning is that you didn't rule out brain damage and you didn't rule out mental retardation, but that's not what you say in your report, is it?

A. Can you refer me to a specific?

Q. I'm asking you, in your report, wasn't your report made to the attorneys that the reason why none of that testing could be relied on was because Bell malingered? Isn't that correct?

A. I believe I made that clear in the report and in my meetings with Mr. Williams.

Q. So he was at least smart enough to have [88] malingered; isn't that right?

A. The research on malingering really suggests that even people with very low IQ are capable of presenting an inaccurate presentation.

Q. Then you told -- further, you told the attorneys and your testimony this morning was that his intelligence, by your estimate of listening to him speak and I guess his demeanor and the other records you reviewed about his education, was that he was an average criminal level of intelligence in the 70's and '80's. That's what you testified to today, isn't it?

A. My testimony was my clinical impression of his IQ was that it was somewhere between the high 70's and the mid 80's.

Q. Your report and the information you gave to the attorneys orally did not tell them in any way, shape or form, did it, that he might be mentally retarded or he might be brain damaged? You never told them that, did you?

A. No, not in those clear terms, no.

Q. As the judge has gone through with you this morning in your report, you, in fact, interviewed, I believe it was at least three of his sisters, maybe more; is that correct?

A. There were three sisters that Dr. Beck [89] interviewed.

Q. You also interviewed his girlfriend, Tracy; isn't that correct?

A. Dr. Beck interviewed Ms. Nicholson.

Q. She was under your supervision, wasn't she?

A. Yes.

Q. It's a comprehensive team approach at the institute to evaluate, isn't it?

A. I don't know what you mean by that.

Q. It's a team approach, isn't it, by the institute, in doing a 3:1 evaluation?

A. It can be an evaluation that would involve more than one discipline. In this case, it didn't. Dr. Beck is also a psychologist.

Q. You have a lot of resources available to you at the institute and you can bring all of those to bear in your evaluation to do the comprehensive understanding of the individual's character and mental condition; isn't that correct?

A. Within the scope of whatever our appointment is, yes.

Q. A 3:1 appointment is all we're talking about this morning.

A. Yes.

Q. You told his attorneys that he was giving a sub **[90]** optimal effort on these tests and he was malingering; isn't that correct?

A. Yes.

Q. You also told them, didn't you, that you could not testify. In fact, you found the statutory mitigating factors in this case were not present, isn't that correct, the Virginia statutory mitigating factors?

A. Just to be clear, by those factors, you're referring to item one and item two?

Q. Yes. If you would look at page five of your report.

A. I see them.

Q. You said you could not testify that he had acted under extreme mental or emotional disturbance at the time, is that correct?

A. That's what I wrote, yes.

Q. And also, you told them you could not testify that he did not have the capacity to appreciate the criminality of his acts or conform his conduct to the law; isn't that correct?

A. That's what I wrote, yes.

Q. Now, specifically with respect to 3:1, isn't your duty to investigate those mitigating factors, but in addition, "any other factors in mitigation relating to the history or character of the defendant"?

[91] A. The Code Section doesn't task me with conducting an investigation.

Q. Please look at page one of your report, Dr. Stejskal, in the very first paragraph. You have parens one, two and three, do you see in the body of that first paragraph?

A. Yes.

Q. If you would, parens 3, and this is identifying what you were doing in the case under your 3:1 evaluation. If you would read parens 3?

A. Certainly. "Whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense."

Q. So you were performing that function, weren't you?

A. In the course of my evaluation, yes.

Q. Thank you.

You also informed the attorneys, didn't you, in your report, that Bell suffered from no mental illnesses.

A. None that I could discern, no.

Q. And then as Your Honor has spoken with you in your testimony, you then went through and described Bell's personal history and background, didn't you?

[92] A. The report does cover that, yes.

Q. If you would look at page two of the report. Under the section that says "records reviewed," there's an italicized paragraph in your letter. If you would please read that paragraph?

A. Certainly. "Note. Jamaican school. Medical, military and criminal records were pursued through the offices of the ambassador of Jamaica in Washington, D.C. Prior to the preparation of this report, the embassy of Jamaica indicated that their staff had no success in retrieving any Jamaican institutional records. Family members in Jamaica were also unsuccessful in obtaining any of this information."

Q. So you actually pursued finding records through the Jamaican embassy in Washington, didn't you?

A. Yes.

Q. Were you aware that trial counsel independently did the same thing?

A. I can't say that I was aware of that.

Q. You specifically advised trial counsel, as you testified this morning, that they should not use you as a witness; isn't that correct?

A. In substance, yes. My style of consultation though is not to give clear directive advice in that manner. Instead, what I did was laid out my analysis of **[93]** the pros and cons of that, the upshot of which was to recommend against using me, yes.

Q. You informed trial counsel that there was a big risk if they used you that the Commonwealth would then be entitled to reciprocal evaluation, didn't you?

A. I did advise Mr. Williams of that.

Q. And that that reciprocal evaluation would be damaging to their client, didn't you?

A. I wouldn't have said that it would be. I would probably have said it certainly could be.

Q. Dr. Stejskal, look at page 11 of your report. These aren't trick questions. This is what's in your report. Did you not, in that advice to counsel, tell them that the risk of the Commonwealth getting an expert could be potentially damaging because that expert could recharacterize what your opinions were in a damaging way?

A. Yes. I used the word could, not would.

Q. And you also identified for counsel the idea that this could be double-edged evidence that we're talking about in this case; isn't that correct?

A. That it certainly could play that way, yes.

Q. And in addition, it would be disadvantageous to their clients because it would come out that their client was a faker and malingerer; isn't that correct?

[94] A. There was the possibility that could be damaging, yes.

Q. Do you remember submitting an affidavit in this case, April 19, 2003?

A. I have a recollection of preparing and submitting an affidavit then, yes.

Q. Dr. Stejskal, is this the affidavit you executed on April 19, 2003?

A. Yes, it is.

MS. BALDWIN: Your Honor, I proffer this as Respondent's Exhibit 2, I believe.

THE COURT: It will be admitted.

(Respondent Exhibit #2 was marked for identification and admitted into evidence).

MR. ROSKOSKI: No objection, Your Honor.

BY MS. BALDWIN:

Q. Dr. Stejskal, in this affidavit, you stated, didn't you, there were several things that you said you were not informed about when you prepared your initial report; is that correct?

A. Yes.

Q. If you would look at the second page of the affidavit in paragraph number nine. You stated that you did not know that Bell was persistently unable to maintain employment because of his inability to follow **[95]** rules?

A. That's what I wrote, yes.

Q. Did you have any evidence whatsoever to show that Bell could not follow rules?

THE COURT: I'm not sure -- when are you taking about; when he made his report in 2001 or when he made his affidavit?

MS. BALDWIN: I guess what I'm talking about, at the time you made the affidavit.

THE WITNESS: Can you repeat the question?

THE COURT: So the question is, you say in paragraph nine of your affidavit, "I did not know

that Mr. Bell was unable to maintain employment because of his inability to follow the work rules."

THE WITNESS: Yes, sir.

THE COURT: So you didn't know that. How did you think that was true, if at all?

THE WITNESS: Counsel that Mr. Bell had at the time, Mr. John Sheldon, had been doing investigation in his case, talking to people who had been employers and associates of Mr. Bell.

BY MS. BALDWIN:

Q. So this was not any information that you independently looked at. It was something that Bell's attorneys told you.

[96] A. That they told me and also showed me in the form of statements and affidavits, yes.

Q. Statements and affidavits of what kind?

A. As I sit here right now, I can't remember them.

Q. And this related to his employment?

A. It was information that was obtained from people who were familiar with his employment history.

Q. Were you aware of the fact that Bell's -- anything about Bell's employment history in this country?

A. Yes.

Q. Were you aware of the fact he was repeatedly fired from jobs because he talked back to employers and was generally belligerent and misbehaved on the job?

A. I believe that I've read and heard information along those lines, yes.

Q. You were aware of that. Were you aware of the fact that he presented a false urine screen at one of his jobs which he had to submit for drug testing?

A. I know that information. I can't recall when it was that I learned that information.

Q. So were you aware of the fact when he was confronted with that and told to produce a clean urine, a new urine screen, that he refused to and became belligerent, argued and was fired?

[97] A. I'm sorry?

Q. Argued with the person that told him to?

MR. ROSKOSKI: At this point, we would like to object. She's impeaching on a collateral statement, not on his prior statement.

THE COURT: Well, it is, but I'll allow it. I think it goes to the basic opinions as stated and the basic testimony.

Doctor, you say -- I take it that in your affidavit you were saying -- I think you may have expressed that if you had known he was unable to maintain employment because of his inability to follow work rules that that would have been relevant to your assessment, so that you didn't know that.

THE WITNESS: It certainly could have been relevant to my assessment.

THE COURT: I guess Ms. Baldwin's questions to you, if the reason he was unable to maintain employment was because he was falsifying records, he was just being a bad employee, that would have, in effect, confirmed your opinion about him, that he was a malingerer, that he intentionally didn't do well on your test. It wouldn't have changed your opinion in any way, would it, if his failure to

maintain employment was for the reasons that Ms. Baldwin has stated.

[98] THE WITNESS: I understand. The information that she related in her questions, I believe was information I was generally aware of around the time I conducted the evaluation. If my memory serves, the statement that I included in the 2003 affidavit had to do with information that his then counsel, Mr. Sheldon, developed concerning his functioning in Jamaica, rather than in this country.

THE COURT: In other words, not to belabor this point, but your affidavit indicates really that his failure to maintain employment may have been because of his slow cognitive performance or his possible retardation and that that would have been relevant, that would have been possibly mitigating evidence, but maybe not, depending on the reason he couldn't follow the work rules.

THE WITNESS: Certainly.

THE COURT: You're saying now that actually, you knew he had had difficulty in the U.S. maintaining employment because he was a bad employee in the manner that Ms. Baldwin has described.

THE WITNESS: In the manner she described, yes.

BY MS. BALDWIN:

Q Dr. Stejskal, also in the same affidavit, I **[99]** believe it's the very next paragraph, so this is still Respondent's Exhibit 2, you stated you did not know that Bell had failed to graduate from the alternate school he attended. Is that also information that would have been based on information Mr. Sheldon told you?

A. I'm sorry. I didn't hear the last part of your question.

Q. Look at paragraph ten of your affidavit. You stated you did not know he had not graduated, is that correct?

A. Yes.

Q. My question is, is that information that Mr. Sheldon gave you?

A. Yes, I obtained that information from Mr. Sheldon.

Q. But you remember in your original report, you have in your report that his sisters reported to you and to the institute that he did, in fact, graduate. So that's the information you had at the time, isn't it?

A. That is the information that I had at the time, yes.

Q. And this new information is something that you didn't check out. It's something that was presented to you from Mr. Sheldon.

A. I had no mechanism in 2003 to independently check **[100]** it out.

Q. Thank you.

Additionally, you say you weren't aware that Bell had a nickname of "Natty Slow" or "Slow," as he was growing up in Jamaica; is that correct?

A. That's correct.

Q. And that's information Mr. Sheldon gave you?

A. At the time, I got that information from Mr. Sheldon and it's been confirmed since then.

Q. Did trial counsel, Mr. Fischel, ever tell you that Bell's nickname he knew him from was "Fast Eddie"?

A. No, I never heard that.

Q. You were not aware of that nickname?

A. No.

Q. Who wrote this affidavit?

A. I wrote this affidavit.

Q. You wrote the affidavit?

A. Yes.

Q. I'm going to show you the second affidavit that you filed in this case and that was executed on May 12, 2005. Is that the affidavit that you executed on May 12, 2005?

A. Yes.

MS. BALDWIN: Your Honor, I would submit this as Respondent's Exhibit 3.

[101] THE COURT: What is the Exhibit number, Madam Clerk?

MR. ROSKOSKI: We have no objection, Your Honor.

THE CLERK: I show it will be #3, Your Honor.

THE COURT: Very well. It will be admitted as Respondent's Exhibit 3.

(Respondent Exhibit #3 was marked for identification and admitted into evidence).

BY MS. BALDWIN:

Q. Dr. Stejskal, in this affidavit you state, don't you, that I contacted you by letter of April 12, 2003? I refer you to paragraph five. No, I'm sorry, not paragraph five.

A. Perhaps paragraph two.

Q. Thank you; paragraph two.

A. Yes, I see that.

Q. Dr. Stejskal, I've handed you a letter dated April 14, 2003. Is that the letter that I sent to you that you received?

A. I believe it is, yes.

MS. BALDWIN: Your Honor, I would submit that as Respondent's Exhibit 4.

THE COURT: It will be admitted.

[102] (Respondent Exhibit #4 was marked for identification and admitted into evidence).

BY MS. BALDWIN:

Q. So Dr. Stejskal, you received a letter from me on April 14, 2003, is that correct, asking you for any information you had about this claim of mental retardation in Bell's habeas petition; is that correct?

THE COURT: Sure, he did. He says in his affidavit he got a request.

BY MS. BALDWIN:

Q. Dr. Stejskal, you never responded to me, did you?

A. No, ma'am, I didn't.

Q. Then seven days later, you submitted an affidavit for Bell, did you not?

A. Yes, I did.

Q. I'm going to go to your last affidavit that you have filed in this case and that was executed on June 21, 2003. If you would look at that, please. With the exception of a check mark at the top, which I'm afraid is a mark I put on it, is this the affidavit you executed?

A. You mentioned 2003.

Q. I'm sorry, June 21, 2006.

A. Yes.

MS. BALDWIN: Your Honor, I submit this as **[103]** Respondent's Exhibit 5.

THE COURT: It will be admitted.

(Respondent Exhibit #5 was marked for identification and admitted into evidence).

BY MS. BALDWIN:

Q. In this affidavit, Dr. Stejskal, you say that you received no information or reports from mitigation specialists or investigators in this case, correct?

A. Yes.

Q. Would you be surprised to learn that Mr. Williams and Mr. Fischel considered you their mitigation expert and specialist?

A. In a way, yes, but in another way, no.

THE COURT: Why don't you explain that?

THE WITNESS: Yes, Your Honor.

In my experience, especially in the early and mid 1990's, it was fairly commonplace that the defense attorneys, especially in Maryland or in Virginia, anticipated the 3:1 expert would be essentially their one-stop shop for mitigation services and they would provide not only the 3:1 evaluation, but also a comprehensive mitigation investigation beyond the scope of the 3:1. My practice over the years since the early 90's has been to clarify with attorneys that I've been appointed to assist under 3:1, what my role is and **[104]** what my role isn't. In my initial conversations with Mr. Williams, this was certainly something that we discussed.

BY MS. BALDWIN:

Q. Are you aware, Dr. Stejskal, that in Maryland, there's an actual statute that gives to every capital defendant a mitigation specialist?

A. I wasn't aware of that.

Q. Are you aware there's no such statute in Virginia?

A. I am aware that there's no such statute. It requires a motion by defense counsel.

Q. Correct. And there's no requirement under Virginia law that a mitigation specialist be provided in every case.

A. Nor is there a requirement that a 3:1 expert be requested.

Q. There is, upon request. Were you aware of that?

A. There's a requirement in the Code that if it's requested, it will be provided?

Q. Right.

A. Yes, I'm aware of that.

Q. Are you aware it's not the same rule that applies for mitigation specialists, and when I say that, I'm talking about investigators.

[105] A. Yes, I'm aware of that.

Q. Thank you.

Now, you testified on direct and also in your June 21 affidavit, you talk a little bit that a mitigation specialist or investigator might ask questions that are a little different than you might ask; is that correct?

A. Yes.

Q. One of the examples you give is you wouldn't ask have you been a good father.

A. I wouldn't ask a third party, was he a good father.

Q. But isn't it a fact that in the report you provided for trial counsel, you actually told them

that Bell had a happy childhood, that his sisters were "protective and respectful parents." You said that Bell was a "mama's boy." You said that Bell's father was a "good provider." You said that Bell was a good husband, initially, to his wife in Jamaica. You said that Bell was a good son to his mother when she was ailing and other descriptive terms like that.

So in fact, you do ask those types of questions and you do make those types of conclusions, don't you?

A. Generally not. That information was elicited by Dr. Beck and in writing up the family history and **[106]** different family member's characterizations of Mr. Bell, we certainly included that information. That's the sort of information that potentially could be presented to a jury through lay witnesses.

Q. So while maybe that isn't your normal practice, it was done in this case.

A. It was done in this case. But basically, the only information that was elicited during the course of the evaluation that seemed to have a viable chance of being persuasive in terms of factors in mitigation was the family history and was information that we began to elicit during the course of our evaluation.

Q. Now, in your June 21 affidavit, you stated, did you not, that the word character is a term of art that means, and I'm quoting from your affidavit --

A. Can you refer me to a page?

Q. Paragraph ten of Respondent's Exhibit 5, which is your June 21 affidavit. Paragraph ten.

A. Thank you.

Q. You said that character is a term of art that means "an aggregate of personality traits that

describe the enduring behavioral tendencies of the subject." Is that correct?

A. That's what I wrote, yes.

Q. But in your report to the trial counsel back at **[107]** the time of trial, you didn't qualify the word character in such a way, did you?

A. In that report, no, I didn't.

Q. Because in that report, you repeated and referred to personal history and character, do you not?

A. That's the language from the Code Section, yes.

Q. Did you ever tell trial counsel that you needed to do any type of further testing to rule out mental retardation or brain damage?

A. I didn't make that specific recommendation. Again, I just described for them my analysis of the pros and cons of taking that part of the evaluation further.

Q. Now, you told trial counsel, your testimony is that you advised them they might want to use lay witnesses as opposed to an expert witness and -- isn't that correct?

A. That's correct.

Q. Part of your reason was it had to do with the double-edged sword nature of the evidence; isn't that correct?

A. That was part of the reason, yes.

Q. Double-edged nature of evidence isn't going to be different coming from an expert or from a lay witness, is it?

A. I'm sorry. Could you speak up?

[108] Q. The double-edge nature of evidence isn't going to be different simply because it comes from the mouth of a lay witness as opposed to an expert witness, is it?

A. No, but the scope and focus of the cross-examination of an expert would be different.

Q. But the general nature of evidence, such as drug abuse, domestic violence, adultery, illegitimacy, abandonment of a wife or child, those are types of evidence that are going to be the same whether it comes from your mouth or from the individuals, isn't it?

A. There's certainly that potential.

Q. The facts are the facts, isn't that correct?

A. The facts are the facts, and the uncertainties are introduced by there being multiple ways of construing the facts.

Q. In fact, you discussed quite extensively, didn't you, with trial counsel about the sister, Nelly, which is the one I think you testified this morning, who had the most information about the family or at least was very productive interviews with Nelly.

A. Yes.

Q. And she, unfortunately, died, didn't she?

A. Yes.

Q. And this was a witness that trial counsel really wanted to use, wasn't it?

[109] A. Trial counsel wasn't aware of her existence until our meeting on December 14.

Q. You told them about Nelly, correct?

A. Yes.

Q. And this was a witness that everybody agreed would probably be a pretty good witness, wasn't it -- wasn't she?

A. Yes.

Q. In the letter that you identified on your direct examination where I believe your office sent to trial counsel, to Mr. Williams, talking about this potential list of witnesses -- do you know what I'm talking about?

A. Yes.

Q. That letter does not say or establish that there ever was such a list in existence, does it? It simply asked, we think there may be one, would you look into it; doesn't it?

A. I believe that list was actually discussed in the meeting that preceded the writing of this letter.

Q. But the letter says, we think we've heard there may be this list that was provided to original counsel and if there is one, would you get it to us; isn't that correct?

A. Yes.

Q. So you or your staff had no knowledge of whether **[110]** there actually was such a list.

A. No direct knowledge, no.

Q. You certainly had no knowledge whether any such list contained any witnesses or information that was different than any information or witnesses you already knew about, did you?

A. (No response.)

Q. For all you knew, it may have been the same witnesses and the same information you already knew.

A. What I'm stumbling over is, we hadn't received any list of any potential witnesses.

Q. I'm talking about the potential list that you talked about in that letter and I believe it was either a sister or girlfriend who had imparted this information to your office.

A. It was his sister, Marjorie.

Q. Thank you. The sister, Marjorie, she said she thought there might have been a list provided to original counsel.

A. That wasn't how she put it.

Q. That's what your letter says, isn't it?

A. Well, it essentially is what my letter says.

Q. Correct. What I'm saying is, but you never received any response from Mr. Williams, you said; correct?

[111] A. We never received the fax of the list that he said he would send.

Q. You never saw such a list, did you?

A. No, we never received it.

Q. And you don't know if such a list ever existed, do you?

A. I have only --

THE COURT: Counsel, I think I understand. He never saw a list. He was told there was a list, but he never saw it. That's that.

You need to move along, please.

BY MS. BALDWIN:

Q Thank you, Your Honor.

Have you read the mitigation specialist's report that's been generated by Ms. Albarus in this case?

A. No, I haven't.

MS. BALDWIN: That's all the questions I have.

THE COURT: Thank you, ma'am. Any redirect?

MR. ROSKOSKI: Please.

REDIRECT EXAMINATION

BY MR. ROSKOSKI:

Q. Dr. Stejskal, on cross-examination, you were asked to read several passages out of first paragraph of **[112]** your report. Will you please read us the last sentence of the first paragraph?

A. In the first paragraph of my report?

Q. Yes, please.

A. "This report constitutes partial fulfillment of this examiner's appointment under this section."

Q. Partial fulfillment. You described how your investigation in a 3:1 investigation looks at a subset of the sorts of things that are of interest to a mitigation specialist. You had a colloquy with the judge on that subject. Could you elaborate for us on some of the things that a mitigation specialist would have included in their comprehensive social history that you did not include in your 3:1 report?

MS. BALDWIN: I'm going to object to that, Your Honor. That's pure speculation. He hasn't been qualified, frankly, as a mitigation expert and we're going into now opinion, I think.

THE COURT: He's already testified about this subject and I'll overrule the objection and allow him to do it.

That was probably the question I was asking you, Doctor. In your view, your opinion, based on your experience, what would a mitigation expert have told defense counsel that you didn't? You talked about Mr. **[113]** Bell's relationship with his children, but

we agree that you really told them about that. So what else, generally or specifically.

THE WITNESS: Let me start with generally.

In my experience, a mitigation investigator talks, interviews, virtually everybody familiar with the defendant -- family members, friends, co-workers, girlfriends, boyfriends, anybody who has firsthand knowledge and experience with the defendant virtually at any point in their life.

THE COURT: Didn't Ms. Beck do that, all the ones she knew about?

THE WITNESS: No, Your Honor. Dr. Beck only interviewed four people and there were an additional 12 or so people that we were aware of that a mitigation investigator would have interviewed and dozens more, both in this country and Jamaica, that a capable mitigation investigator would have interviewed. The standard of practice, in my experience, mitigation investigators that I work with, strive for, is to, in the end, create a life history narrative that includes information from dozens, sometimes scores of interviews they conducted with people familiar with the defendant. Part of the purpose of this is to be able to construct a continuous time line narrative of the defendant's [114] history. The more tactical purpose of the mitigation investigator's work is to identify potential witnesses who would be able to testify during the penalty phase and provide compelling and clear information about the defendant, including specific anecdotes that defense counsel believe would tend to go towards the factors in mitigation. That far exceeds the scope of a 3:1 evaluation.

THE COURT: Anything else?

THE WITNESS: Yes. An additional function that I'm aware of mitigation investigators conducting is, to for lack of a better way of putting it, engage in witness development. Often family members are very hesitant to speak to investigators, or attorneys or experts. They're very hesitant to testify. In my experience, mitigation investigators have taken central roles in forming alliances and relationships to gradually bring witnesses out of their shells, if you will, so they can tell the part of the story they can tell and if it's relevant and they perceive it's going to be useful, tell that part of the story during the penalty phase. So that's an additional, crucial role for mitigation investigators, in my experience.

THE COURT: Any other questions?

BY MR. ROSKOSKI:

[115] Q. Dr. Stejskal, can we explore that witness development idea just a moment? You talked about Nelly, who you interviewed in Jamaica. Is she the only person in Jamaica that you interviewed or that your assistant interviewed?

A. I believe she was the only person in Jamaica that she interviewed.

Q. Did you or your assistant make any effort to exhaust the range of potential people in Jamaica who could have given mitigating testimony?

A. We didn't even attempt that.

Q. Did you try to attempt to exhaust the range of potential people in Winchester, Virginia, who could have given mitigating testimony?

A. No.

Q. Could your report or anything you told Mr. Williams have been taken as saying we have found all the mitigating evidence there is to be found?

A. Absolutely not.

Q. Did it even come close?

A. No.

Q. Dr. Stejskal, what did you tell Mr. Williams about what the gaps were in your investigation, the areas that you did not exhaust?

A. Specific areas had to do with the childhood [116] history, the early family experience and disruptions that apparently occurred during his early and middle childhood while parents were coming and going to work in this country; his early exposure to alcohol and marijuana use, beginning, Mr. Bell reported, at age three, on the insistence of older family members who thought it was entertaining to see him intoxicated on these substances.

THE COURT: You told him the things that are set forth in your report.

THE WITNESS: Yes, sir.

BY MR. ROSKOSKI:

Q. And nothing more.

THE COURT: I'm sorry?

BY MR. ROSKOSKI:

Q. And nothing more.

A. In terms of substantive material relating to Mr. Bell's life, no.

Q. On the last few pages of your report, you use the word double-edged. Did you tell Mr. Williams that evidence of childhood abandonment was double-edged and he shouldn't present it?

A. Not specifically with respect to childhood abandonment, no.

Q. What about drug use as a child?

[117] A. No.

Q. In fact, did you use the word double-edge only to refer to the possibility of mental retardation?

A. I need to refer to my report.

THE COURT: I think the report says double-edged history of child abuse.

BY MR. ROSKOSKI:

Q. Let's talk --

THE COURT: It only uses that term.

BY MR. ROSKOSKI:

Q. Not the question of his abandonment and detachment from his parents as a child.

A. No, it didn't include that in that discussion.

Q. In cross-examination, you were asked whether he was smart enough to have malingered, and you responded that mentally retarded people can malinger. Does malinger, in the sense in which you use it, reflect a conscious effort to trick you and deceive you?

A. It can. It's recognized in the field that malingering, which is a generic term, can arise by several different motivational routes, one of which is the conscious intention to deceive.

Q. Did you have any reason to believe that's what was motivating Mr. Bell?

A. It was my impression that that was not his [118] motivation, but his motivation was coming from a different source.

THE COURT: What do you mean by that?

THE WITNESS: The pattern of performance on the test that Mr. Bell gave me was consistent in certain respects with his manner during our eight hours of interview together in that he tended to be

melodramatic individual who presented things in very broad emotional terms, felt very aggrieved and used each interview, and in my assessment, the occasions of testing, to demonstrate, to show me how upset he was with his situation, and this is a common type of exaggeration on testing that we call, in the shorthand way, a cry for help where the person uses the evaluation, specifically, the opportunity presented by the testing, as a way of showing the evaluator how much they need help, how much distress they're in, how upset, how undone they are by their present circumstances.

BY MR. ROSKOSKI:

Q. So is it fair to say you told Mr. Williams that Bell was a faker and a liar?

A. I did not tell Mr. Williams that. I described Mr. Bell as exhibiting a certain kind of low grade malingering that did not involve the conscious intention to deceive or get over on the doctor.

[119] Q. When you were discussing some of the things that a mitigation specialist might do and some of the gaps in your report and your investigation as compared to those, did you investigate any possible evidence in aggravation? Let me rephrase.

A. Not precisely, no.

Q. Did you, for example, interview a woman named Dawn Jones?

A. No.

Q. Would you have known if she had aggravating testimony to give?

A. Not from the information that I received at the time of the evaluation.

Q. Would you have been able to advise Mr. Williams as to how to counter any aggravating testimony she might give?

A. No, lacking the information, I was in no such position.

Q. Did you interview a woman name Billy Joe Swartz?

A. This is the first time I heard that name, so no.

Q. So presumably, you would not have known if she had any aggravating testimony to give or how to advise Mr. Williams to negate that?

A. That's correct.

Q. Did you interview anyone in Jamaica regarding an **[120]** incident where Bell got into a fight with someone and tore his shirt?

A. At the time of the evaluation, I didn't have any information about that beyond what Mr. Bell told me.

Q. Again, you could not have told Mr. Williams anything about how to deal with that aggravator if it came up at trial.

A. That's correct.

Q. Lastly, during cross-examination, you went through a list of some of the historical observations you made in your report about Bell's life, that he was attached to his mother and those sorts of things. Were any of those your primary observations or were they things other people had told you?

A. Those were things other people told Dr. Beck.

THE COURT: What's the difference? I don't understand. You were not there when Mr. Bell was being nurtured by his mother. How could you have

any direct examination of it? You have to rely on what other people tell you, don't you?

THE WITNESS: Yes.

THE COURT: I don't understand the point of the question.

I think we're getting far afield, counsel. We really need to move on.

[121] MR. ROSKOSKI: One last question and I'm done.

BY MR. ROSKOSKI:

Q. Did you make any effort to exhaustively survey all of the positive things any of those people might have to say about Mr. Bell?

A. No.

MR. ROSKOSKI: Thank you.

MS. BALDWIN: A couple questions, Your Honor, that were brought up?

THE COURT: Yes, ma'am. We're going to end the examination of this witness now. I'll allow you two questions.

RECROSS-EXAMINATION

BY MS. BALDWIN:

Q. Dr. Stejskal, you never found any evidence in this case, did you, of abandonment or neglect of Eddie Bell by his parents?

A. Not of neglect. There was information that indicated that his father came and went frequently and that eventually, his mother went. It was unclear to me from the information that I was able to learn whether there was adequate provision made for his care during their absences.

Q. Dr. Stejskal, your report talks extensively about **[122]** how his father came to this country to

work hard to send money back which resulted in his family having a higher standard of living. This is not a case of abandonment or neglect, is it?

A. Not on a consistent basis over the long haul. There certainly were periods of time that Mr. Bell described where he was removed from the home, not permitted in the home, for various reasons, for sometimes extended periods of time, and the circumstances for that, I was never able to fully understand or learn.

Q. Your report says differently, doesn't it? Your report to the attorneys said Bell elected to leave home when he thought he was being punished too harshly by his father, doesn't it?

A. That's one way I believe it was described.

Q. In his interviews with you with regard to the malingering or his melodramatic appearance to you, he was constantly complaining that everyone was out to get him and things were being done wrong to him, wasn't he? That's the way he was presenting to you, wasn't he?

A. No. He presented in that manner in terms of making those sorts of accusations and claims on a couple of occasions. But I can't say that that was characteristic of his presentation across the eight **[123]** hours.

Q. I believe you just testified that on the shirt-tearing incident, which was an assault conviction of Eddie Bell in Jamaica, you said you didn't know anything more than what Bell told you about it; is that correct?

A. At the time of my evaluation, yes.

Q. So you actually discussed it with him.

A. Yes.

THE COURT: Thank you, sir. You may step down.

May this witness be excused?

MR. ROSKOSKI: Yes, sir.

THE COURT: You may be excused, sir.

I think those are all copies. I take it you can return those to Ms. Baldwin.

Counsel, we're going to take a luncheon break at this time and we'll be in recess for 45 minutes, 45 minutes.

(Recess at 12:40 p.m. until 1:30 p.m.)

You may call your next witness.

MS. SAUNDERS: Petitioner calls Marie Deans.

MARIE DEANS, CALLED AS A WITNESS BY PETITIONER, SWORN

DIRECT EXAMINATION

BY MS. SAUNDERS:

[124] Q. Catherine Saunders, on behalf of petitioner.

Can you please state and spell your name for the record?

A. It's Marie Deans; M-a-r-i-e, D-e-a-n-s.

Q. I'm going to ask you to speak directly into that microphone in front of you?

A. I'm having trouble hearing you, too.

Q. Ms. Deans, what is your occupation?

A. I'm a mitigation specialist.

Q. What is a mitigation specialist?

A. It's someone who does investigation and evaluation of a person's life history.

Q. Is it a mitigation specialist a psychologist?

A. Not necessarily.

Q. What is the difference between a mitigation specialist and a psychologist?

A. Any psychologist? In a capital case or?

Q. Are you familiar with the term 3:1 expert?

A. Yes.

Q. What is the role of a 3:1 expert?

MS. BALDWIN: Objection, Your Honor. This witness is not an expert psychologist. She can't give an opinion on what a psychologist is supposed to do.

THE COURT: I take it, Ms. Deans, you would be answering that question based on your experience, is **[125]** that right? In other words -- why don't we do it this way?

If you'll tell me just briefly a little bit of your background as a mitigation specialist, briefly, your education and your experience.

THE WITNESS: I started doing mitigation before that's what it was called, in the late 70's, in South Carolina. Then when I moved here, there was a Virginia coalition on jails and prisons and I worked on trial and habeas and eventually clemency petitions.

THE COURT: Do you have any professional education in this field?

THE WITNESS: In this field; well, I am an English major.

THE COURT: So how many cases would you say, Ms. Deans, that you've worked on as a mitigation specialist in your career?

THE WITNESS: At the trial level, it's about 240; at habeas, about 95.

THE COURT: I take it that there's no certification for your specialty, no professional body that certifies mitigation specialists; is that correct?

THE WITNESS: That's correct, although I think we're moving into that at this time.

THE COURT: But basically, anyone who has an **[126]** interest in this field and can get hired can enter the field of mitigation specialist.

THE WITNESS: I have had about a thousand hours of CLE. I think you need a little more than that.

THE COURT: That's relevant. In what areas have you had CLE?

THE WITNESS: Both in investigation and in the mental health field.

THE COURT: Who gives these CLE's.

THE WITNESS: The NLADA, the Legal Defense Fund, the State of Virginia. And I've also done some -- I've been on the faculty of quite a number of them as well.

THE COURT: These are CLE's for lawyers, as well as persons like you?

THE WITNESS: Yes.

THE COURT: In capital cases.

THE WITNESS: That's right.

THE COURT: Mitigation issues in capital cases.

THE WITNESS: That's right.

THE COURT: Based on your experience, Ms. Deans, what does a mitigation specialist do that's different from or in addition to a person, a mental health expert, appointed under the Virginia Code Section **[127]** commonly referred to as 3:1?

THE WITNESS: Well, our investigation is far more widespread. We interview a lot more people. Our interviews are focussed differently because we're not so focussed as they are. In most cases, the psychologists and psychiatrist and neuropsychologists that I've worked with have depended on my work to do their work.

THE COURT: In what respect?

THE WITNESS: In getting that background information, because they have a much more focussed interview that they're dealing with and issues much more focussed than mine. But mine feed into what they're doing.

THE COURT: If it's for their field that they need this information, I suppose they could do the interviews. But would you say that it's because you're experienced in interviewing people in capital cases and can develop that sort of helpful information to them?

THE WITNESS: Yes, yes, and also, we're cheaper.

THE COURT: Right, right. The psychiatrist would charge more per hour.

THE WITNESS: A lot more.

THE COURT: You work exclusively for defendants in capital cases, I take it.

[128] THE WITNESS: I don't know of mitigation on the other side, so, yeah.

THE COURT: True, but you could develop aggravating factors or a person could develop aggravating factors as an investigator or counselor.

THE WITNESS: Yes.

THE COURT: But that's not done or you don't do it.

THE WITNESS: I don't do it, no.

THE COURT: Go ahead, ma'am.

MS. SAUNDERS: Thank you, Your Honor.

BY MS. SAUNDERS:

Q. Have you ever been appointed by the Court to act as a mitigation investigator?

A. In Virginia?

Q. In the State of Virginia?

A. Yes.

Q. We've been talking about mitigation. In your experience, what constitutes mitigation evidence?

A. It depends. There's no list of mitigating evidence.

Q. What types of things are you looking for in a mitigation investigation?

A. I'm looking for the life history. I'm looking to both find out if there's anything in particular out **[129]** there and eliminate things that are not out there. Part of what we do is assessing records and assessing interviews for the kind of normal kinds of mitigation and for organicity, brain injury, mental illness, on and on.

Q. Are negative things in a person's background mitigating?

A. No, not necessarily. They can be.

Q. What about good things in a person's background? Are they mitigating?

A. Yes.

Q. In the course of doing a mitigating investigation, do you sometimes come across negative things in a person's background?

A. Yes.

Q. Do you stop a mitigation investigation?

A. No.

Q. Why not?

A. If it actually is negative -- when you use the term negative, I'm not sure whether you mean exactly aggravating, by statute aggravating? But you move on and see if you can respond to that negativity and sometimes those things that appear to be negative are, in fact, mitigating evidence.

Q. You mentioned aggravators. What is your role **[130]** with respect to aggravators?

A. I didn't hear you.

Q. What is your role as a mitigation specialist with respect to aggravators?

A. To respond to them.

Q. What do you mean when you say respond to them?

A. I want to know what the aggravators are so I can see if there is mitigation that works against those aggravators. I also want to know how it fits into my narrative.

Q. Let's talk about the Bell case in particular. What was your first connection with the Bell case?

A. A call from Lloyd Snook.

Q. Who is Mr. Snook?

A. He's an attorney in Charlottesville.

Q. Did you know Mr. Snook before?

A. I've known him since 1983.

Q. Had you ever worked with him before?

A. Many, many times.

Q. In what context had you worked with him?

A. Mainly, in habeas. We did a lot of habeas work together; some clemency work. He was the president of the board of Virginia Coalition on Jails and Prisons. I was executive director.

Q. Did you know Mr. Bell's other attorney, at that **[131]** time, Jud Fischel?

A. You know, I sort of know him. I can't really say I do know him. The coalition -- he called me, I think, one time about getting him some Eighth Amendment material for a case he was working on and I believe I met him at a CLE a couple times. That's the extent of my knowledge of him.

Q. Ms. Deans, do you recognize this document?

A. I don't have my glasses. I'm sorry. I can't read this -- yes.

Q. What is it?

A. It's a plan, a basic outline of a plan for doing a case in mitigation.

Q. Who is this letter from?

A. It's from Denise Lunsford.

Q. Who is Denise Lunsford?

A. She was co-founder with me of the Virginia Mitigation Project, a lawyer that I had worked with, in Charlottesville.

Q. When was this letter written?

A. February 7.

Q. Was it a regular course of your business at the Virginia Mitigation Project to send out these letters?

A. Upon request.

MS. SAUNDERS: I'd like to move the admission **[132]** of this letter.

MS. BALDWIN: I'll object, Your Honor. It's hearsay.

THE COURT: I'll admit it.

Go ahead.

It will be admitted as Respondent's Exhibit #5.

(Respondent Exhibit #5 was marked for identification and admitted into evidence).

BY MS. SAUNDERS:

Q. Ms. Deans, why did you and Ms. Lunsford send out a plan or send out this letter?

A. Because the judge in Eddie's case asked for a plan, as I understand it. That came from Lloyd, asking for it.

Q. At that time, what did you believe the Bell litigation investigation might encompass?

A. I'm sorry?

Q. At that time, did you have any understanding or belief about what a mitigation investigation on behalf of Mr. Bell might include?

A. I knew that it was going to be on the little more complicated range because one of the questions that I ask a lawyer when they contact me about doing a case, particularly when I'm doing several others and the time, **[133]** taking into consideration the time of the case, is where all the person has lived, if he's lived in one county or has he lived all over the place. That has a lot to do with how much time it takes to do an investigation.

Q. Why is it necessary to know if he lived somewhere else or grew up somewhere else?

A. Because you want to go to that place.

Q. Why?

A. You want to talk to witnesses. You want to get records. You want to also, if possible, get in your own mind, what the look of the community, the look of

the home, the look of the people are. It takes a long time to build trust with these people. So you can't just pick up the phone and do it.

Q. In this case, did you have an understanding of where Mr. Bell grew up?

A. I did not know where he grew up. I knew that he had been born in Jamaica. But I don't remember that I knew until I actually met Mr. Bell how much time he had spent in Jamaica.

Q. Do you know if you would have been able to go to Jamaica as an appointed investigator in Mr. Bell's case?

A. Would I have been able to go; sure, sure.

Q. Ms. Deans, were you prepared to conduct a full mitigation investigation on behalf of Mr. Bell?

[134] A. Certainly.

Q. Did you and Ms. Lunsford have the time in which to conduct a thorough investigation?

A. We wouldn't have taken the case if we didn't have the time.

Q. Were you committed to working on Mr. Bell's case?

A. Of course.

Q. So, do you understand that you became -- were you, in fact, appointed in Mr. Bell's case, to act as a mitigation specialist?

A. I've never seen the Court order, but I was told finally, in, I think it was March, that we had been appointed.

Q. After you were appointed, what was your next involvement in the case?

A. I asked Mr. Snook to take me to meet Edward Bell.

Q. Did you get to visit Mr. Bell?

A. I did.

Q. When did you visit Mr. Bell?

A. I think it was the latter part of March.

Q. How long did you visit with Mr. Bell?

A. It was two or three hours, actually with him in the jail.

Q. Was that a complete interview?

A. No, it was an opening interview.

[135] Q. What types of things did you and Mr. Bell discuss?

A. First, I told him -- I tried to explain to him what a mitigation specialist does and that I would be on his side, so he needed to be open and honest with me. I got some basic information from him, which is about what you get on a first interview. Again, there was no reason for him to trust me because I had walked in with not even a Bar card. Just walked in and said, here I am. It takes some time to build that trust.

I found out that, just basic stuff. I asked him some basic mitigation questions like, have you ever had a head injury. He had. I asked him about other kinds of illnesses and spiked fevers and that sort of thing. Then I began to ask him about his family and friends and schools and teachers and that sort of thing.

Q. Did you get contact information for his family?

A. No, I didn't, because as he began to tell me, and he was having a little bit of trouble, Lloyd Snook said, don't worry about all that, I've got a whole list of all that, all the contact information.

Q. Did you ever get that contact information?

A. No.

Q. Do you remember anything else about that interview, that initial interview with Mr. Bell?

[136] A. I remember that I had trouble understanding Eddie and it surprised me that I did, just because I'm familiar with Jamaica. So I was surprised that I wasn't understanding his speech.

Q. Did that difficulty understanding him make you think of any areas of future investigation?

A. Well, the fact that I was having difficulty understanding his use of the language, plus a head injury, which was described to me as fairly serious -- he didn't dramatize it, but it sounded fairly serious -- would certainly make you think that you would need to investigate or look for other indicators of brain damage or brain injury.

Q. What were the next steps you took in Mr. Bell's investigation?

A. Calling Lloyd, getting Denise to call Lloyd, trying to get that list that he told me he had of family and records and all that, plus any records. I mean, I had not one scrap of paper.

Q. Did you have any information or contact information about Mr. Bell's family?

A. None. That's what I'm telling you, none.

Q. Did Mr. Snook ever return your calls?

A. I don't remember him returning my calls, no.

Q. Did you try calling Mr. Fischel?

[137] A. I did call him, but I think -- I was, at one point, out of the country on another case and when I came back, called Denise and she said no, we still don't have the information. So I tried to call Lloyd. Didn't get through. And I tried to call Mr.

Fischel and left a message for him. You know, I don't remember whether that was like April, I think.

Q. What about writing counsel?

A. What about what?

Q. What about writing a letter to counsel?

A. I finally wrote a letter to Lloyd saying, you know, you haven't given me anything, I haven't done anything, either get this case continued or we need to be released from it.

Q. Did you hear back from Mr. Snook?

A. No.

Q. So then what did you do?

A. I wrote the judge.

Q. Have you ever written a judge before in this context?

A. In this context, no.

Q. Did the judge respond to you?

A. Yes, he did.

Q. Are you able to read that document? Do you recognize that document?

[138] A. This is the letter that Judge Hupp sent me.

Q. Do you see the signature at the bottom?

A. Yes.

Q. Whose signature do you understand that to be? A. Judge Hupp.

MS. SAUNDERS: I'd like to move the admission of this document as a public record.

THE COURT: It will be admitted.

BY MS. SAUNDERS:

Q. Ms. Deans, what was your reaction to seeing this letter?

A. I don't remember exactly having any particular reaction. I mean, I think I was -- I don't really remember exactly what my reaction was.

THE COURT: Let me ask you this. Are you going to give a hard copy of that to the clerk, please, so we can mark that as an exhibit?

MS. BALDWIN: Your Honor, what number is that, please?

THE COURT: That's Petitioner's Exhibit #6. (Petitioner Exhibit #6 was marked for identification and admitted into evidence).

BY MS. SAUNDERS:

Q. If you look at the second paragraph of the letter?

[139] A. Of Judge Hupp's letter?

Q. Of Judge Hupp's letter. Can you read the first sentence, please?

A. Mr. Snook has withdrawn as counsel for the defendant in this case and Jud Fischel has assumed the role of lead counsel.

Q. Was this the first time you had learned Mr. Snook had withdrawn as counsel?

A. Yes.

Q. Did you ever hear back from the attorneys in this case?

A. Jud Fischel, somebody in his office or him, I don't remember which, called me later in the summer or early fall, and wanted my contact information. I assumed he wanted my notes from the interview with Eddie. So I called him back right away. I got a machine. I left all the information. I believe I said I had the notes, you know. But he never called me back.

Q. Was your experience on working on Mr. Bell's case typical of your experiences?

A. No.

Q. How would you describe this case in your experience with it?

A. The most disorganized case. I mean, it reached a level of absurdity, really.

[140] MS. SAUNDERS: Thank you. I'm sure Ms. Baldwin may have a few questions for you.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. BALDWIN:

Q. Good morning, Ms. Deans, or afternoon.

You told Lloyd Snook, didn't you, in this case that you were ready to go to work on this case when he asked you to come on board?

A. I don't remember exactly what our conversation was. I must have said, if you get us appointed, we'll do the case.

Q. The trial at that point was set for May, wasn't it?

A. That's right.

Q. You all were ready to go to work on it, weren't you?

A. I was ready in January, yeah.

Q. But didn't you tell Mr. Snook that you were busy on a case in Fredericksburg so you were going to put Denise Lunsford on to it?

A. The way we do this, would be to get Denise started getting documents and finding the people that we needed to interview and doing that sort of thing.

Q. So you told him you were busy on another case, **[141]** isn't that correct?

A. Yes.

Q. And in fact, you told him that Denise Lunsford needed to get from him a release; isn't that correct?

A. Yeah, a release form signed, addresses and also all the records. We didn't have at that point -- well, at no point did we ever have, but we also would want all the forensics, everything on the case.

Q. At that time when you went up to the jail to have your first interview with Bell and you were with Lloyd Snook -- is that correct?

A. Yes.

Q. At that time, Lloyd Snook obtained a written release from Bell, didn't he?

A. I don't believe so.

Q. So if he says that's what happened, you disagree with that?

A. You know what I remember about that is that Lloyd fell asleep. I don't know whether he got -- if he got a release form, he didn't -- I don't remember that.

Q. So you would disagree with him?

A. I'm not saying I disagree.

THE COURT: She says she can't remember it.
BY MS. BALDWIN:

Q Do you remember telling Mr. Snook that you didn't **[142]** want to be bothered with that release right then and to please send it on to Denise Lunsford?

A. No.

Q. Was there any reason why after that first interview that you and your organization could not have immediately started with your investigation?

A. No. There was no reason in January that we couldn't have started.

Q. You knew who the defendant was, right?

THE COURT: Certainly, she knew the defendant.

THE WITNESS: I knew the defendant's name.
BY MS. BALDWIN:

Q. You knew where he was being held in jail, isn't that correct?

A. I don't remember whether I knew that at first or not.

THE COURT: The question is, Ms. Dean, why didn't you start right in or your colleague start right in with your mitigation investigation?

THE WITNESS: First, we hadn't even been appointed. We were asked if we could do it if we were appointed. We gave the information that we were asked to give for the judge to decide whether to appoint us or not.

[143] THE COURT: But you were advised, according to my information, in February of 2000, that you had been appointed.

THE WITNESS: Actually, we don't remember that. We remember my calling Lloyd at the end of February and saying, what happened with the case and his saying maybe then, oh, you got appointed, and my asking then could we immediately set up a visit with Mr. Bell.

THE COURT: So you did visit him, Mr. Bell.

THE WITNESS: Yes, yes.

THE COURT: My question to you is, why didn't you start the mitigation investigation right after you talked to Mr. Bell? Why didn't you walk out of the jailhouse, you and your colleague, begin the investigation?

THE WITNESS: Because I made a mistake.

THE COURT: Okay. What was that?

THE WITNESS: The mistake I made was when I began to ask Eddie for contact information. We had some difficulty understanding one another and Lloyd reached over and said, don't worry about that, I've got all that information, I'll just send you the whole list of all the contact information and --

THE COURT: Your answer is you were waiting for the contact information from Mr. Snook.

[144] THE WITNESS: Yes, yes. And frankly, Your Honor, I regret that decision. I should have said, never mind, and gone ahead.

THE COURT: Then until you got the letter from the Court, you were still waiting, basically, for the information.

THE WITNESS: Well, both Denise and I were calling on a regular basis.

THE COURT: I understand, I understand.

THE WITNESS: But we never got it, no, sir. We never got anything on the case.

THE COURT: After you interviewed Mr. Bell, that was really the last substantive work that you did on the case.

THE WITNESS: Absolutely.

BY MS. BALDWIN:

Q. So Ms. Deans, it's your testimony you really dropped the ball on this case?

A. I should have not allowed Lloyd to stop me from getting the information from Eddie directly.

Q. Now, with respect to your testimony that Mr. Snook told you that he had some information, contact information and was going to give it to you, if he told the Court something different and said that he never had any information and was relying on you, are you saying **[145]** that that is incorrect, his representation to the Court?

A. I am, yes.

Q. You're not a psychologist, are you?

A. No, I'm not.

Q. You're not a lawyer?

A. No, I'm not.

Q. Your association with the Virginia prison, the coalition for prisons and jails?

A. Coalition on Jails and Prisons.

Q. That was back at a time, wasn't it, when death row inmates didn't really have a statutory right to counsel in habeas; isn't that correct?

A. Yes.

Q. Wasn't your organization primarily assisting death row inmates in obtaining counsel?

A. We were getting counsel and assisting counsel. They were all volunteers. One of the ways we could get a lawyer to come in was to say, we'll assist you.

Q. But you didn't become a mitigation specialist until after that period of time, is that correct?

A. No, I was doing mitigation work then. I did mitigation work in South Carolina.

Q. But with just an English degree, is that correct?

A. That's right.

Q. You said that you -- I didn't understand your [146] testimony exactly. Did you say that you attended CLE programs?

A. Yes.

Q. And those would be Continuing Legal Education programs for lawyers?

A. Yes -- well, they're for capital defense teams.

Q. And you're not a lawyer, are you?

A. No.

Q. And you were allowed to attend these?

A. Of course. I was a faculty at many of them.

Q. Isn't it a fact that really in this case, you gave the case to Denise Lunsford and then you had a case that took you out of the country, you had other cases and so, just no information was ever really gathered on the case; isn't that correct?

A. I'm sorry. Would you repeat that?

THE COURT: I think I understand, Ms. Baldwin. She has testified, as I understand -- the reason you didn't do anything on the case, which you consider a mistake now, is that you never heard back from Mr. Snook about the contact information.

THE WITNESS: Right. I never --

THE COURT: As I understand also, you were working on another case and you wanted Denise to start it.

[147] THE WITNESS: Yeah, get the basic --

THE COURT: I've forgotten Denise's last name.

THE WITNESS: Lunsford.

To get the basic information for us.

THE COURT: Do you remember what the circumstances were of your other case? Were you going to be free at a certain time?

THE WITNESS: Your Honor, you can do three to five cases at a time. So it's just fitting in -- fitting your schedule in.

THE COURT: You didn't believe this other case would exclusively take all of your time.

THE WITNESS: No, no, no, no.

THE COURT: Do you have any further questions, Ms. Baldwin?

MS. BALDWIN: No further questions.

THE COURT: Any redirect?

MS. SAUNDERS: No, Your Honor.

THE COURT: May this witness be excused?

MS. SAUNDERS: Yes, Your Honor.

THE COURT: Thank you, ma'am. You may be excused.

You may call your next witness.

MS. SAUNDERS: Petitioner calls Carmeta **[148]** Albarus.

MS. BALDWIN: Your Honor, could I bring something to the Court's attention? I was informed during the lunch break that there were several witnesses present in the courtroom during testimony who are on the petitioner's witness list. I'm concerned about that. I was informed that Ms. Aretta Terry, Mr. Oswald Bell and two children who may be Mr. Bell's children, apparently were in the courtroom. Those are all on the witness list and I wanted to make sure I bring that to the Court's attention.

MR. CONNELL: With respect to Aretta Terry and the two children, we don't intend to call them as witnesses. I don't have information about Mr. Bell. I saw him come in right after lunch. I sent someone to say "you can't be here" and he left.

MS. BALDWIN: My information is he was here during testimony.

THE COURT: We'll take that up if and when he testifies.

CARMETA ALBARUS, CALLED AS A WITNESS BY PETITIONER,
SWORN

MS. BALDWIN: Your Honor, I'm going to make a brief motion. I made the motion before trial, but with regard to this particular witness, that this is the type **[149]** of testimony from a mitigation specialist that the Virginia Supreme Court has ruled dispositive as a matter of state law is inadmissible because it contains -- is based on hearsay. I just want to make that motion.

In particular, with respect to a claim of ineffective assistance of counsel, if we're not using this witness, it would be particularly inappropriate to consider it since the Virginia Supreme Court does not allow it. Trial counsel could not have put this witness on under Virginia law from the Virginia Supreme Court.

MS. SAUNDERS: Your Honor, may I respond?

THE COURT: Yes, you may.

MS. SAUNDERS: Ms. Albarus is offered for a number of points, Your Honor. One is to show what the results of a competent mitigation investigation would have found. Moreover, Ms. Albarus' testimony proffers the evidence that trial counsel could have

found, had they even taken the minimal steps necessary to conduct a thorough mitigation investigation.

She will be testifying about her efforts, her investigation, the ease of witnesses that were available to her and available to be interviewed, the readiness of Mr. Bell's family to participate, to help out in finding and identifying mitigation evidence.

THE COURT: Let me ask you this on the **[150]** hearsay question though. If the witness -- is this witness going to testify as to the results of her interviews with mitigating witnesses?

MS. SAUNDERS: Yes, Your Honor.

THE COURT: And why isn't that admitted for the truth of the matter, that is, that those persons, had they been called or if they were called, would testify in such and such a manner? Why isn't that hearsay and inadmissible?

MS. SAUNDERS: She's testifying to the availability of those witnesses and their existence and the ease of finding them. Additionally, to the extent Your Honor finds they are hearsay, they're basis for her expert opinion under Federal Rule 703, which goes to her position that had investigation taken place at the time, mitigation evidence was available and would have been found in the form of these witnesses, in the form of the documents.

Additionally, Your Honor is permitted to accept testimony in the form of affidavits and in your discretion, under the habeas Rule 7 and 28 U.S.C. 2246.

Moreover, Your Honor, and we'd be happy to lay a foundation to this, a number of the testimony she will talk about are memorialized in affidavits, which

we believe should be admissible under the residual hearsay [151] exception. Each of those affiants were videotaped, being sworn by a justice of the peace. They have sufficient indicia of reliability and the evidence is important to the interests of justice and the basis of justice and it's also evidence that it's more probative and available in other forms.

THE COURT: I'm going to take the objection under advisement and reserve decision on it and allow you to proceed.

DIRECT EXAMINATION

BY MS. SAUNDERS:

Q. Can you please state and spell your name for the record?

A. My name is Carmeta Albarus. It is spelled C-a-r-m-e-t-a. Albarus is A-l-b, as in boy, a-r-u-s.

Q. Ms. Albarus, what is your occupation?

A. I'm a mitigation specialist.

Q. How long have you been a mitigation specialist?

A. Over 17 years.

Q. How many cases have you worked on?

A. I've worked on over 400 cases during that time.

Q. How many of those cases were capital cases?

A. A good three-quarters of those cases. But I must caution that not all the cases that I worked on proceeded to trial, as capital cases. Some were pled out [152] and some just did not -- were not authorized as capital cases, eventually.

Q. Have you ever been qualified as an expert in social history investigation in death penalty cases?

A. Yes, I have.

Q. How many times and in what jurisdictions?

A. I have testified, been qualified to testify around 22 times, and I have been qualified in state court and in federal court.

Q. Have you ever testified as an expert in social history or mitigation investigation in the State of Virginia?

A. Yes, I have.

Q. Can you describe those occasions?

A. I have testified actually four times. I testified two times most recently in the Leroy Malvo case and I testified in federal court some years ago, in Richmond, Virginia. I also testified in Norfolk, Virginia, on federal cases.

Q. Was the Leroy Malvo case in state court?

A. Yes, Leroy Malvo's case was in Chesapeake.

Q. In your experience, has mitigation investigation been paid for by the courts in a capital case?

A. Yes.

Q. Describe your background in mitigation.

[153] A. I was trained as a teacher in Jamaica. That's where I was born and raised. Upon migrating into the United States, I pursued further studies. I was trained as a paralegal. I completed my credits for my Bachelor's in human services. Then I went on and did my Masters in social work.

Q. Ms. Albarus, are you a psychologist?

A. No, I'm not a psychologist.

Q. Are you a clinical social worker?

A. I'm a clinical social worker.

Q. Have you ever worked an cases where a psychologist or mental health expert has also been appointed?

A. Oh, yes, absolutely.

Q. In your experience, how is what you do different from what that psychologist or mental health expert would do?

A. My view is giving a complete history of the individual and information that I then receive. Then I can convey to the attorneys who will then see what other experts they need in terms of making a diagnosis, because I cannot make a diagnosis.

Q. Have you trained others to conduct mitigation investigations?

A. Yes. For the past ten years or so, I have been **[154]** actively involved in training individuals in mitigation, conducting mitigation and using cultural sensitivity to conduct mitigation.

Q. Have you written articles about mitigation?

A. Yes, I've written two articles. Two articles have been published.

Q. Ms. Albarus, how does someone become a mitigation specialist?

A. Well, mitigation specialist can come from a variety of disciplines. However, it is dominated by people who have been trained in the area of social work and counseling. The reason why this is so is because one has to apply clinical training in conducting the interviews and to be making appropriate assessment as to further assessments and further evaluations.

Q. Does any person trained in social work have the requisite skill to be a mitigation specialist?

A. Not necessarily.

Q. Why is that?

A. Because the mitigation specialist, it's really a pretty specialized field that requires a tremendous amount of time and patience and empathy in conducting these investigations. Social workers, for the most part, work with victims and sometimes they're -- to the client who is the perpetrator of a crime, sometimes to **[155]** look beyond the crime, sometimes it's, you know, it's difficult to do that. The kind of time that you've got to expend to build trust because trust is critical in doing mitigation work. I say trust because in order for a person to divulge information that sort of gives you an idea as to the factors that interacted in his life that could result in him being accused or convicted of a crime takes that level of sensitivity. So that is what really sets the mitigation specialist apart from the social worker.

Q. How soon, in your experience, should a mitigation investigation begin in a case?

A. In my experience, it begins at the inception of the case.

Q. Why is that?

A. Because the mitigation helps to inform the strategy that would be used for the guilt phase, as well as the penalty phase. Having an understanding of those factors is really very important.

Q. We've been talking a lot about mitigation evidence. What is, in your experience, mitigation evidence?

A. Mitigation is really a process through which you get an understanding of a person, of the defendant. That is done through a comprehensive social history **[156]** investigation with a view to

identify factors that would have impacted on the individual, in a nut shell.

Q. In general, when you start a mitigation investigation, where do you start?

A. You have to start with the defendant. You start with the defendant and then you branch out to those closest to the defendant and then you go in the wider community. Then you have to go to institutions that affect one or the other in the defendant's life. But you start with the defendant.

Q. What about aggravators?

A. Well, you always have to have an understanding of what aggravating factors are there because as I said initially, that helps to sort of inform the strategy. So it's important to understand it. So when you are investigating the person's life, you have an understanding as to what aggravating factors are so that they can be weighed against whatever mitigating factors you should find.

Q. How do you know when an investigation is complete?

A. When you have a clear understanding of who this person is and, you know, additional information sort of becomes redundant because it really sheds no new light on the person's character or the person's behavior.

[157] Q. Are there certain people or records that you interview or obtain in every mitigation investigation?

A. Oh, yes, you've got to -- every piece of paper, to the degree that it's possible generated about the person's life, you would want to try to get. You want to speak with individuals who have known the

person and can speak to his character. It really is a very, very involved process.

Q. You mentioned individuals you'd want to speak to. Can you describe who those individuals are?

A. Parents, siblings, teachers, religious leaders, employers, anyone, associates, people in the community, wives, husbands, children, anyone who had some sort of impact on the person's life. You want to speak to as many people as possible.

Q. Ms. Albarus, let's talk about your work here. Were you asked by Mr. Bell's habeas counsel to conduct a social investigation history into Mr. Bell?

A. Yes, I was.

Q. When was this?

A. It was in March of this year.

Q. Did you agree to conduct that investigation?

A. Yes, I did.

Q. Was this a thorough mitigation investigation?

A. No, I would not really characterize it as a [158] thorough investigation because as I said, this was in March of this year.

Q. Why couldn't you do the thorough investigation?

A. Because time would not have allowed it, not the amount of time that I had, given when this proceeding would be. It was not thorough, but to the degree that I could get as much information as I could and to compile the report that I have.

Q. Were you able to review the minimum investigation?

A. Yes, I was able to speak with Mr. Bell. I was able to speak with his parents and his siblings and I was able to go to the community where he grew up.

Q. Ms. Albarus, how did you start your investigation?

A. Well, I met with attorneys -- and this was in April of this year. I met with you and co-counsels, and I also met with Mr. Bell and I met with his parents and sisters, in Winchester.

Q. Did you stop your investigation after meeting with these people in Winchester?

A. No, I did not.

Q. What did you do after you met with the people in Winchester?

A. Shortly thereafter, I went to Jamaica.

[159] Q. Why did you go to Jamaica?

A. Because that was where Mr. Bell was born. That was where he spent his formative and his developmental years. The first, I think, 28 years of his life was spent in Jamaica. So I went there.

Q. Is it standard, in your experience, to go to where a client spends his formative years?

A. Yes, that normally is the procedure because you want to go where it began.

Q. How did you conduct your investigation in Jamaica?

A. I was given quite a bit of assistance because I was directed by Mr. Bell's parents to a family friend, a very close family friend, who was then able to escort me to individuals who I had to see and the schools and the hospital.

Where Mr. Bell was raised in Jamaica is a small district by the name Drapers. So it was pretty easy to get around. It's a very small area.

Q. Who was that family friend?

A. Her name is -- let me check my notes. I'm so sorry. Marva Sewell or Marva Downie.

Q. Is it common, in your experience, to rely on family friends or relatives to provide contacts to other people?

[160] A. Yes.

Q. Do you know if Ms. Downie lived in Jamaica and was available in 2000, 2001?

A. Yes, she was.

Q. Was it expensive to go to Jamaica?

A. No, it was actually cheaper to fly to Jamaica than it was to fly to National Airport, from New York.

Q. Can you describe your process of investigating in Jamaica?

A. Well, I went down with an associate because I needed as much help as I could have. I met with several individuals. Then counsel, Mr. Connell, came afterwards, and we identified individuals who we needed to have to make affidavits. I met with them, typed up the affidavits and then Mr. Connell and a justice of the peace -- we say justice of the peace in Jamaica, is a notary public here. We went around with her and had the individuals sworn in and signed the affidavits that were submitted.

Q. Do you have any evidence that -- or did you document in any way that the witnesses were sworn in?

A. Yes, we videotaped the swearing in and the signing of the documents.

MS. SAUNDERS: Your Honor, as a demonstrative, we have an example of one of those **[161]** videotapes, if we could show it now.

MS. BALDWIN: I object, Your Honor. That was not provided to us.

MS. SAUNDERS: It's a demonstrative exhibit.

MS. BALDWIN: I think that's not demonstrative. That's substantive evidence, Your Honor.

THE COURT: Again, I have under advisement the initial objection to this, and subject to that reservation or decision, I'll allow you to show it.

MS. SAUNDERS: Thank you.

(Videotape shown).

MS. BALDWIN: Your Honor, I object to this. It's hearsay. I have no way to cross-examine this.

THE COURT: I understand.

Go ahead.

BY MS. SAUNDERS:

Q. Ms. Albarus, do you recognize the documents I just handed to you?

A. Yes, I do.

Q. What are those documents?

A. These are affidavits from individuals who we met with in Jamaica and who were sworn in front of the JP and that they signed this.

MS. SAUNDERS: Your Honor, at this time we move their admission, subject, of course, to Your **[162]** Honor's prior ruling.

THE COURT: These are the same as has been previously submitted, is that correct?

MS. SAUNDERS: Yes, Your Honor.

MS. BALDWIN: Your Honor, I object. The claim is a claim of ineffective assistance of counsel. Your Honor has ordered that a hearing can be held in which they can prove that the information that was not presented or found by trial counsel. This is pure hearsay. This is contrary to the intent of this evidentiary hearing and I cannot cross-examine any of it and I object on that basis.

THE COURT: Yes, ma'am.

They will be marked for identification, as Petitioner's Exhibit #7, and I'll reserve decision on their admissibility.

(Petitioner Exhibit #7 was marked for identification).

MS. SAUNDERS: Thank you, Your Honor.

If the record could reflect, we'd just like to incorporate the arguments made in our motion on this subject at this point.

THE COURT: Yes, ma'am.

Let me ask you this, Ms. Albarus, about these affidavits.

[163] What was the process of obtaining them? You talked to these people?

THE WITNESS: I spoke to these people.

THE COURT: And then how did it get on a piece of paper?

THE WITNESS: Then I typed up the information because I went equipped with my typewriter and typed up the information when Mr. Connell was there, because he had to go through the process. Then we went back to the individuals, they read it

and then they agreed to what was there was what they shared with me and then it was signed.

THE COURT: Mr. Connell actually prepared the affidavit? Is that what you're saying?

THE WITNESS: You mean typed them up? No, he did not type them up.

THE COURT: You did.

THE WITNESS: Yes, myself and my associate with me.

THE COURT: You said you typed up the information, but when you said that, you meant the affidavit.

THE WITNESS: That's what I meant.

THE COURT: You prepared the affidavit.

THE WITNESS: Yes, myself and my associates.

[164] THE COURT: Tell me who would be your associate.

THE WITNESS: The gentleman who went down with my, Conrad Lindo, we work together, and he also happens to be my spouse. We work together. So he assisted in the typing up because we didn't have a lot of time, Your Honor.

THE COURT: I'm just trying to find out --

THE WITNESS: So I met with them. I went from the Sunday --

THE COURT: Let me ask you this. Did you take notes, for example, and then go back somewhere and type up the affidavit or did you type it up in front of them or how did that work?

THE WITNESS: No, I took notes, went and I typed it up and then I returned and had them read.

THE COURT: How long did this process take all together?

THE WITNESS: My goodness. I would say a good eight, nine hours because we met with them on Sunday and then we started the process that Monday evening, maybe around 5:00, and it went through all day the following day, to the next morning. Then we went back to Kingston.

THE COURT: Did you prepare all the **[165]** affidavits first and then go back and have them sign them?

THE WITNESS: Yes, we had to prepare the affidavit and then we go back.

THE COURT: Did they all come kind of as a group?

THE WITNESS: No, no, no, no, we have to go around to them. We have to drive around to them.

THE COURT: You took this notary or magistrate or justice of the peace, whatever that's called.

THE WITNESS: Yes, she was with us.

THE COURT: What did you tell the people that you talked to in order to obtain these affidavits?

THE WITNESS: I asked them about Mr. Bell and how long they have known him.

THE COURT: No, I mean -- okay, you did that. What did you tell them about what you were doing, what the purpose of this was?

THE WITNESS: I told them that I am working as a social worker and I am getting information from them about their interaction with Mr. Bell.

THE COURT: Surely, you told them that these would help to save his life.

THE WITNESS: Oh, well, yes -- I don't think **[166]** I used those words, Your Honor.

THE COURT: You explained to them the import of this.

THE WITNESS: Yes.

THE COURT: That you were trying to find information that hadn't been introduced at his prior trial.

THE WITNESS: Exactly.

THE COURT: And if this information was sufficient, he might be able to get a new sentencing and perhaps he wouldn't be sentenced to death.

THE WITNESS: Yes, similar words to that. I told them this was information I was trying to get that was not obtained prior.

THE COURT: Go ahead.

BY MS. SAUNDERS:

Q. Did you also tell the affiants that they were under an obligation to tell the truth?

A. Oh, yes.

Q. Did all the affiants swear to tell the truth?

A. Yes, they did.

Q. Let's talk about the results of your investigation. Did you submit a report summarizing what you found during your social history and investigation?

A. Yes, I did.

[167] Q. Ms. Albarus, is this a copy of your report?

A. Yes, it is.

Q. Does this report accurately summarize your investigation, including the interviews you conducted and the documents you reviewed?

A. Yes.

MS. SAUNDERS: Your Honor, we'd like to submit this report into evidence.

MS. BALDWIN: Your Honor, I'd like to inquire of this witness regarding her qualifications for having even done the report.

THE COURT: We'll mark this for identification purposes as Petitioner Exhibit #8. I will not admit it at this time and reserve decision on that.

(Petitioner Exhibit #8 was marked for identification).

BY MS. SAUNDERS:

Q. Ms. Albarus, in your investigation, did you find the existence of mitigating evidence relating to Mr. Bell's family relationships?

A. Yes, I did.

Q. Can you describe that evidence?

A. What stood out for me --

MS. BALDWIN: I'm going to object on hearsay. I don't like to keep standing up, but I do [168] think I need to do this for the record.

THE COURT: Yes, ma'am. Again, I will admit the testimony on a conditional basis. At this time I'll overrule the objection so you may proceed.

THE WITNESS: Yes, I learned of a very close and loving relationship that he had with his mother.

BY MS. SAUNDERS:

Q. Can you describe what you learned of that relationship?

A. Just how attentive he was to her, how close he was to her. I met with her briefly. She is very disabled because she suffered a stroke. She was so anxious to share with me the things, the little things that he would do for her in terms of cleaning for her,

cooking for her, even after he was grown. He would go fishing, bring the fish home and cleaning it and cooking it for her. Just a very, very attentive son to his mother.

Q. What about Mr. Bell's relationships with his extended family?

A. Yes, I met with several of his nieces and cousins and learned that he was a very caring and a very kind individual to his family, both his immediate family and his extended family.

Q. Ms. Albarus, in your investigation, did you find **[169]** mitigation evidence related to Mr. Bell's childhood and upbringing?

A. Yes, I did.

Q. Can you describe what you found?

MS. BALDWIN: Objection, hearsay.

THE COURT: Same ruling.

Go ahead.

THE WITNESS: I learned that he was slow and interestingly, going to Drapers and asking about Eddie, very few people would know him as Eddie. They knew him as Slow. The name Slow was given to him because he was slow. He was slow in learning, in his academics, and he was slow in doing things.

BY MS. SAUNDERS:

Q. How did the nickname Slow impact his childhood?

A. Well, it impacted in the sense that being slow was sometimes seen as being lazy and not being able to complete tasks and not to do things as was instructed and he had a very -- has a demanding father who worked hard, provided for his family and

he expected his children to do what they were told. In Jamaica, we use a term "hard of hearing" as to explain when a child does not respond quickly and do what is asked of them quickly. Because he was slow, this had, you know, certain ramifications for him. So he was beaten quite a **[170]** bit and his perception of the beating was that it was extremely excessive. So that was something that was very significant for him in his childhood.

Q. Who beat Mr. Bell?

A. He was beaten primarily by his father, who was the disciplinarian in the home.

Q. Did you find any corroboration of these beatings during your investigation?

A. Yes, I spoke with an aunt who recalled that he was beaten and recalled there were times he would go to her house because -- to get away from it. I learned from cousins who said he was beaten. But I have to qualify that they said it was because he was being disciplined. So that's the term that was used. He was being disciplined to do his work.

THE COURT: Let me interrupt if I can and ask you this, ma'am, about his nickname of Slow.

Is it your testimony that you understand from your informants that he was slow because he acted slowly?

THE WITNESS: Because he moved slowly and because he was slow to learn because I spoke to a teacher who said as well that she had to spend a little bit more time with him.

THE COURT: In paragraph 24 of your report, **[171]** you say "Edward thought that one reason he was beaten was because he was slow. As a child, his peers named him Slow or Natty Slow because he did

everything slowly. This means that he was slow to do his chores. He was slow to respond to the demands of his father. He indicated that he was also slower than his sisters intellectually."

So I'm trying to get a handle on what your investigation showed about this slowness. Was it simply that he was a lazy see person or acted like a lazy person?

THE WITNESS: It could be interpreted as laziness.

THE COURT: You did not find that he was called Slow because he was mentally retarded.

THE WITNESS: No, I did not get that he was slow because he was mentally retarded. Mental retardation would not be a term that would have been used by the individuals with whom I spoke.

THE COURT: I don't mean that they used it. You and I know what it means.

THE WITNESS: Yes.

THE COURT: A diminished cognitive ability.

THE WITNESS: That is what I picked up. That is what I would have asked that further [172] investigation should be used for.

THE COURT: How did you pick that up? I understood that he was slow, named Slow because he acted lazy. He didn't respond to his father's demands.

THE WITNESS: No.

THE COURT: Why does that connote to you a cognitive disability?

THE WITNESS: Because speaking also with his teacher, I spoke with his basic school teacher, which basic school in Jamaica would be sort of equivalent

to kindergarten school, and she also stated that he was slower to learn, to pick up things, to understand things than the other children and she would have to spend a little bit more time with him in terms of teaching him. That was Evelyn Downer, yes.

THE COURT: That was what you considered to be, what we would call a kindergarten teacher, right?

THE WITNESS: Yes, kindergarten teacher.

THE COURT: Go ahead, ma'am.

BY MS. SAUNDERS:

Q. Did you uncover mitigation evidence about Mr. Bell's employment while he was in Jamaica?

A. Yes. I learned that he did barbering, but he was employed in construction for a good number of years, about four or five years, at the Palace Hotel, which is **[173]** the same hotel where I stayed when I was down there. He made the banister rails that's used decoratively at the hotel.

Q. Is that a highly skilled job?

A. No, it was not a highly skilled job. In fact, the information that I obtained was that the jobs that he did have did not require intellectual skills. For instance, I spoke with a Mr. Clark who was also a JP and who recommended Eddie for a job on the cruise ship. He himself said that the job that he had was --

MS. BALDWIN: I'm going to object to all this hearsay.

THE COURT: Yes, ma'am, I understand your objection. I'll allow it, conditionally.

THE WITNESS: Washing dishes and cleaning up because he was not really intellectually there to

do more advanced work. So his employment there was really unskilled work.

BY MS. SAUNDERS:

Q. You mentioned --

THE COURT: Let me ask you this, ma'am. In Jamaica, and you obviously would know, my impression is that Jamaica is not a well developed economy; is that true?

THE WITNESS: It's a third world country.

[174] THE COURT: Would you say that most Jamaicans employed do manual or unskilled work?

THE JUROR: No, I wouldn't say that.

THE COURT: Why not?

THE WITNESS: Well, I've not lived there in 20 years.

THE COURT: Do they work in factories?

THE WITNESS: We have factory jobs. We have industrial jobs. We have --

THE COURT: What is the unemployment rate in Jamaica presently?

THE WITNESS: I do not have those statistics. But even working in the tourist industry on the north coast, you have a variety of jobs. So I could not say that most of the jobs there are manual work. We use the term casual worker, who would work in construction, doing gardening and stuff like that. But we have the higher institution of learning where we have people in a variety of professions.

THE COURT: I'm certainly not being critical of your native country, but I had the impression at least that the type of work as described that Mr. Bell performed in Jamaica was not unusual to the type of work that many Jamaicans are employed in. He

worked on a cruise ship, for example, in the tourist industry, **[175]** cleaning and dishwashing dishes and so on.

THE WITNESS: Yes, but that would not be indicative of the typical jobs that we have in Jamaica.

THE COURT: Thank you, ma'am.

Go ahead.

BY MS. SAUNDERS:

Q. Ms. Albarus, you mentioned a head injury. What did you learn about Mr. Bell's head injury?

A. That he was playing with a playmate, a cousin, distant cousin, and they were at this abandoned golf course. His friend had a golf club that he was using to hit stones. In trying to hit the stone, he hit Mr. Bell above his -- in his head, a little above his left eye, and that rendered him unconscious. He was knocked unconscious and was taken to the hospital and he was admitted and stayed in the hospital for four days.

MS. BALDWIN: Continuing objection, Your Honor.

THE COURT: Yes, ma'am. I'll allow it.

Go ahead.

BY MS. SAUNDERS:

Q. What does the fact that he was admitted into a hospital in Jamaica indicate to you?

A. It indicates to me that it was a serious head injury.

[176] Q. Did you find any records to corroborate that Eddie had had this injury?

A. I went to the hospital where he was treated and I received a letter that was -- the information

was extracted from an admission book that showed that he was. But the actual records themselves, they said they did not have the actual records, just an indication that he had been admitted and he was in there for four days.

MS. BALDWIN: Your Honor, I'm going to object to this. It was not provided to the respondent as part of this expert's data.

MS. SAUNDERS: Your Honor, may I respond?

THE COURT: Yes, please.

MS. SAUNDERS: I believe it was contained as one of the materials. If it was not, that was, at the very least, inadvertent and she can testify to the basis of it here.

THE COURT: Was it listed as an exhibit?

MS. BALDWIN: No, Your Honor. This was in Ms. Albarus' report. She referenced the things she was basing her report upon. We were never provided this.

THE COURT: But she did reference the information.

MS. BALDWIN: Yes, she did.

THE COURT: I will have this marked for **[177]** identification and reserve decision on it's admissibility.

That will be marked as Petitioner's Exhibit #9 for identification.

(Petitioner Exhibit #9 was marked for identification).

Go ahead, ma'am.

BY MS. SAUNDERS:

Q. For the record, Ms. Albarus, this Petitioner's, marked for identification Exhibit 9, is the letter you received?

A. Yes.

Q. Ms. Albarus, during the course of your investigation, did you investigate potentially aggravating evidence?

A. Yes, I did.

Q. Did you investigate potential aggravators, for example, involving Dawn Jones?

A. Yes, I did.

Q. What did you discuss with Ms. Jones?

MS. BALDWIN: Objection; hearsay.

THE COURT: I'll admit it conditionally.

Go ahead, ma'am.

THE WITNESS: I spoke to Ms. Jones about the relationship that she had with Mr. Bell and she [178] indicated to me that there was incidents of domestic dispute and there was an incident about the waiving of a gun as well. However, what really she focussed primarily on when I did meet with her was the relationship that Mr. Bell had with their daughter, Kydesha. So to the extent that she was talking about her relationship, it really had a lot to do with her daughter, the relationship that she had with her daughter.

BY MS. SAUNDERS:

Q. In your understanding, was her relationship characterized by that incident?

MS. BALDWIN: Objection; hearsay.

THE COURT: I'll conditionally admit it.

Go ahead, ma'am.

THE WITNESS: Yes, she did say that it was not characteristic of the relationship.

BY MS. SAUNDERS:

Q. What about the incident in Jamaica involving a shirt tearing? Did you investigate that?

A. Yes. I spoke to a couple individuals --

MS. BALDWIN: Objection; hearsay.

THE COURT: I'll conditionally admit it.

Go ahead.

THE WITNESS: -- who knew about the **[179]** incident. I spoke to one person who was present at the incident.

BY MS. SAUNDERS:

Q. Did you speak to anybody else about the incident?

A. Yes, I spoke to the father of the young man who was the victim in the case.

MS. BALDWIN: Objection; hearsay.

THE COURT: I'll admit it and Ms. Baldwin, I'll allow you a continuing objection to all of this testimony.

MS. BALDWIN: Thank you, Your Honor.

BY MS. SAUNDERS:

Q. Ms. Albarus, I'm sorry. Who were the people you talked to?

A. I spoke with Rondell Davis, who was present at the time. I spoke with to a couple other people who knew of the incident and I spoke to Mr. Vonell Thompson, who was the father of the young man whose shirt was torn during this fight with Mr. Bell and Paul Thompson, is his name.

Q. What was your understanding about the seriousness of this?

A. My understanding, it was a scuffle between two young people. The gentleman who was present said he could not even really remember what caused it, but Mr. [180] Thompson, it was a new shirt he had on, and during the what he called the wrestling, his shirt was torn. I spoke with Mr. Thompson who said he reported the matter as a matter of principle because his son's shirt was torn. He said even though Mr. Bell was ordered to pay for the shirt, he said he refused to accept the money. He did not collect the money because he felt he did it as a matter of principle, was what he said.

Q. What was your understanding of how important this incident was in Mr. Bell's background?

A. That it was not characteristic of the kind of individual that Mr. Bell was or known to be in the community where he lived.

Q. Ms. Albarus, what did you learn about Mr. Bell's reputation in the community?

A. That he was respectful; that he was trustworthy; that he was a hard-working individual; that he was kind; that, you know, he was non violent and non retaliatory.

Q. Did Mr. Bell have a reputation for disliking authority or police officers?

A. No, I did not pick up on that at all.

Q. Did you ask about whether or not he had a reputation for disliking authority or police officers?

A. Yes, I spoke with two police officers.

Q. Who were they?

[181] A. Angellita Hamilton, who's a police officer in Jamaica and she happens to be the niece of Mr. Bell. I spoke with her. She did not indicate that

there was any problem that he had. As a matter of fact, she spoke very fondly of Mr. Bell. She remembers Mr. Bell, his love for animals and his dogs. I spoke with a gentleman by the name of Mr. Steveroy Campbell.

Q. Who is Steveroy Campbell?

A. He's also a police officer and he and Mr. Bell went to school together.

Q. Do we have a videotape of that we'd like to play that's demonstrative?

MS. BALDWIN: I object, Your Honor.

THE COURT: I'm sorry?

MS. SAUNDERS: We have a videotape of Mr. Campbell we'd like to play.

MS. BALDWIN: Your Honor, that is not demonstrative. That is substantive evidence of his testimony.

THE COURT: I'm going to sustain the objection to that.

MS. SAUNDERS: Your Honor, may we preserve our objection for the record?

THE COURT: Yes. You don't need to reserve anything.

[182] BY MS. SAUNDERS:

Q. Ms. Albarus, in addition to Mr. Bell's family of origin, what else did you learn of Mr. Bell's family relationships?

A. I learned that he was married; that he was married to Barbara Bell, now Williams. I learned that he had a daughter by Barbara. I learned that upon migrating into the United States, he had four other children with two different women -- Dawn

Jones, with who he had Kydesha; and with Tracy, he had Eddie Jr.; Xavian; and D'Antre.

Q. What did you learn about his relationships with his wife and then later, with his girlfriends?

A. What I learned about his relationships -- we start with Barbara. She said that he was a good and loving husband and she really stressed how good he was at home in terms of, she said, he cooked for me, he washed for me, he even cleaned my shoes. She's a teacher. At the time that they met, she was being trained or getting ready to go to the teachers' college and she said he was very supportive, both financially and emotionally, and they really had plans to be together. They didn't get married, but the relationship eventually ended. But what she said was that even from a distance, you know, he was a loving father to his **[183]** daughter, Kamille. He sends her money up to this day.

Q. What did you learn about his relationship with Dawn Jones?

A. Dawn Jones, the relationship with Dawn Jones started while he was still married to Barbara. So that developed -- there was conflict there. But what she also said, which is really something that is really consistent, is the relationship that he had with his daughter. The first thing that she shared with me when I met her was her daughter's birth. Kydesha was born prematurely and she said that at the time that she had Kydesha, she had to be in an incubater and she had been looking for Eddie and wondering where he was for hours and then she learned that he was there by Kydesha's bedside praying for her, that she would live. But of course as I had said earlier, there were conflicts, especially

later on in the relationship, and Mr. Bell's need to have things done according to his way.

Q. What did you learn about Mr. Bell's relationship with Tracy and his children with Tracy?

A. Again, a supportive and loving father to his children.

Q. Ms. Albarus, is the time that you've spent on this case typical of what you would spend on a capital case?

[184] A. No. As I indicated earlier, I really did not have the time to do an exhaustive investigation and I would normally have spent many hours -- typically, I spend about 50 hours with my client. I spent about five hours with Mr. Bell. I would have met with the family several times. I had two brief meetings with them. I had to condense it as much as I could to have my report tendered for this hearing.

Q. In your experience, had this been the pre-trial investigation, would you have taken those additional steps you just mentioned?

A. Yes, I would have.

THE COURT: Any further questions?

MS. SAUNDERS: No further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. BALDWIN:

Q. Ms. Albarus, in your CV, you state that you have a degree in social work?

A. Pardon me?

Q. In your CV, you have some information about your background, including the fact that you have a Masters degree in social work; is that correct?

A. Yes.

Q. You don't have any dates on this education [185] experience. When did you receive your degree and your Masters in social work?

A. In 1995.

Q. You don't have any degree in psychology, do you?

A. No, I don't.

Q. Or in law.

A. No.

Q. Your CV says that you -- your company that you operate is called CVA. Is that your initials?

A. Yes.

Q. So you own that company, is that correct?

A. Yes.

Q. In your CV, you state that you, and I'm going to quote this, that you formulate alternative sentencing proposals and pre-sentencing reports; is that correct?

A. Yes.

Q. My question is, you don't do that for any courts, do you? A court doesn't appoint you to prepare a pre-sentencing report, do they?

A. Yes, upon the request of counsel.

Q. So you prepare a report --

A. Yes.

Q. -- for counsel, that they can then argue to the judge.

A. That he can submit to the judge, yes.

[186] Q. You're not a probation or parole officer who investigations cases for a court.

A. No, no.

Q. Your CV says that you were a graduate intern student in '95, '95. Is that when you were studying for your Masters?

A. Yes, as a part of my training.

Q. You previously worked for Alphonso Associates?

A. Yes.

Q. You were a senior caseworker or case manager, is that correct?

A. Yes.

Q. And at that time -- so that was before you got your degree in social work, is that correct?

A. Yes.

Q. What was your training for that work that you did?

A. Well, prior to that, as I said, I was trained as a teacher and in my training as a teacher, I would have had to do child psychology. So there was some basis in terms of my understanding of human nature that I would have applied in terms of assisting Ms. Alphonso in the work that she did.

Q. So you had no formal education in mitigation specialist or no kind of license associated with that at [187] that time?

A. No, no. The only thing I had other than my teaching diploma was my certificate in paralegal, my paralegal certificate.

Q. Before you worked for Alphonso Associates, you were a child care provider?

A. Yes.

Q. Did you do that in your home or other people's home?

A. I did that in other people's home.

Q. Before that, in Jamaica, you owned your own company, making pastries, is that correct, for four years?

A. Yes.

Q. Your primary work, is it not, is in courts, testifying on behalf of the defendants and working for the attorneys who represent them; is that correct?

A. Yes.

Q. You don't work for the prosecution.

A. I've been asked once.

Q. In general, you don't.

A. In general, I'm usually asked by defense attorneys, yes.

Q. You say you're an LCSW, Licensed Clinical Social Worker?

[188] A. Yes.

Q. When did you obtain that license?

A. I was certified in '95, shortly after I received my Masters. Then I got my LCSW about two years ago. Prior to that, I was a certified social worker, which requires an examination by the Board of Education.

Q. Where was that?

A. That's in New York, in the State of New York.

Q. Do you hold any of those licenses in Virginia?

A. No, I do not.

Q. Are you familiar with the National Organization of Forensic Social Work?

A. Yes.

Q. Are you a member of that?

A. Yes, I'm a member.

Q. Are you a diplomat in that organization?

A. No, no.

Q. Are you accredited by the Academy of Forensic Social Work?

A. No.

Q. Are you familiar with that organization?

A. I've heard of it.

Q. Are you aware that they develop standards of practice for those who testify in court about social work?

[189] A. As I said, I've heard of them. I am not familiar with their rules and regulations.

Q. So you would not call yourself a forensic social worker.

A. Pardon me?

Q. You would not call yourself a forensic social worker.

A. Forensic social worker is one who works -- there is no training. You cannot go to school and be trained as a forensic social worker. A forensic social worker is one who works within the criminal justice system. Given that, I could describe myself as a forensic social worker because working within the parameters of the criminal justice system.

Q. But this particular organization that you said you're not real familiar with, this is an organization which actually has accreditation for persons to oversee the qualities of the work, who hold themselves out as forensic social workers. You say you're not a member of that or you're not accredited by them.

A. No, I'm not accredited by them.

Q. Do you remember, Ms. Albarus, a case in which you testified when you worked for Alphonso Associates, and the name of the case is State v. DeFrisco?

A. Yes.

[190] Q. Are you familiar with that? That was one of your first cases you testified on?

A. That was the very first case I testified on.

Q. Are you aware of what the New Jersey Supreme Court said about your testimony in that case?

A. No.

Q. So then you're not aware of the fact they said you testified in that case without any degree or training whatsoever and that your testimony was completely discredited because you took credit for your employer's work, Ms. Alphonso. You're not aware of that?

A. I am aware of the problems associated with that case because of what happened with Ms. Alphonso. She was ordered not to testify by her doctor and she asked me, because I had assisted her on the case, to testify. At that time, I did not have a Masters degree.

Q. Then you're saying you're really not aware of the comments that the Court made about your testimony in that case.

A. No, I'm not aware of the comments.

MS. BALDWIN: Your Honor, I'd like to move admission of a copy of that case, State of New Jersey v. Anthony DeFrisco.

MS. SAUNDERS: No objection, Your Honor.

[191] THE COURT: You wish to introduce this as an exhibit?

MS. BALDWIN: Yes, I do, Your Honor.

THE COURT: It will be admitted. That's Respondent's Exhibit #6.

MS. BALDWIN: Thank you, Your Honor. (Respondent's Exhibit #6 was marked for identification and admitted into evidence).

BY MS. BALDWIN:

Q. Ms. Albarus, in Bell's case, did you speak to either Mr. Williams or Mr. Fischel, his trial attorneys?

A. No, I did not.

Q. Then do you have any knowledge or did you know that Mr. Fischel was a probation and parole officer for five years before he even went to law school?

A. I did not know that he was a probation officer, no.

Q. Did you know that Mr. Williams was a social worker for 15 years before he went to law school?

A. I was told that Mr. Williams was a social worker.

Q. And you're aware that your own licensing board, the New York Board of Social Work, permits lawyers to practice social work, even without a social workers degree.

A. Yes, I would imagine there are a number of **[192]** attorneys who do practice social worker and practice as mitigation specialists, yes.

Q. Just in general, this is a quickie summary of what you say that your work is when you perform a mitigation evaluation, and that's basically that you

find witnesses; you find records; you interview the witnesses; you review the records and you present that to the lawyer who's representing the defendant, with a report of your findings and your interviews? Is that accurate?

A. Yes.

MS. SAUNDERS: Objection, Your Honor, to the extent that mischaracterizes Ms. Albarus' testimony. She submitted an extensive report and testified extensively both about the nature and quantity --

THE COURT: She answered yes, but I'll allow you to redirect her on that.

BY MS. BALDWIN:

Q. Ms. Albarus, are you aware of Dr. Stejskal's participation in this case?

A. I did review. There was something that I did review. An affidavit? Was it an affidavit?

Q. He submitted an extensive report to trial counsel. Did you review that report?

A. No, I did not.

[193] Q. Do you know that Dr. Stejskal is a respected forensic psychologist?

A. I don't know the gentleman, no.

Q. Do you know that he interviewed witnesses in this case and he tried to find records and he presented Bell's lawyers with the results of his interviews and his evaluation?

A. I did not see the report, but I know that he had worked on the case.

Q. Do you know that Dr. Stejskal told trial counsel not to use him as a witness, that there would be damaging evidence if they did?

A. Yes, I'm aware that his findings would not have been used.

Q. Do you know what malingering is?

A. Yes, I know what malingering is.

Q. Are you aware that Dr. Stejskal found that Bell malingered on the test he gave him to try to find out whether he had brain damage or mental retardation?

A. I heard that there was an assumption that there was malingering.

Q. So you say you did not review his report. So you didn't rely on any of the information that Dr. Stejskal found regarding these witnesses?

A. Well, you know, it would really depend because **[194]** it's a different kind of investigation.

Q. My question, I'm sorry, is more specific.

A. No, huh-uh.

Q. That is, I'm asking whether you relied on any of the information that he generated in his evaluation.

A. No, I did not.

Q. Were you aware that Bell's sisters told Dr. Stejskal that Bell was a spoiled mama's boy?

A. No, I didn't know that they had told him that.

Q. Or that his sisters complained that they were more mistreated than he was, growing up?

MS. SAUNDERS: Objection, Your Honor, to this line of questioning as beyond the scope of direct examination.

THE COURT: I don't believe so. I think it's within the scope. I'll overrule the objection.

BY MS. BALDWIN:

Q. Do you need me to repeat the question?

A. Yes. Could you please?

Q. Were you aware that he reported to Dr. Stejskal -- his sisters reported to Dr. Stejskal that in their view, he was more favorably treated, their brother was more favorably treated, by their father than they were?

A. I'm not aware that they had reported that to him.

Q. Did they report that to you?

[195] A. Well, they gave me indication that he was a mama's boy.

Q. Now, these punishments that were administered by his father -- and you have used the word "beatings." Isn't it more fairly accurate to say that when the children disobeyed, that they got whippings? Here's my question? Doesn't abuse have very particular meaning in your line of work, social work?

A. Yes.

Q. And it's usually used along with abuse and neglect, beatings. And my question to you is, you cannot fairly say that that's what occurred in this case, can you?

A. No.

Q. Thank you.

There was no report in this case, is there, of sexual abuse?

A. No, there was no.

Q. And there's certainly no report of parental neglect.

A. No.

Q. Because, in fact, his parents provided very well for Bell and his sisters, didn't they?

A. Yes.

Q. Were you aware of the fact that Bell's nickname **[196]** among some people here in the States was Fast Eddie?

A. No, I didn't know that.

Q. Were you aware that his sister, Marjorie, reported that Edward Bell taught her how to read and write?

A. No, I was not informed of that.

Q. Were you aware of the fact that their sister, Nelly, and the other sisters, were described in home life where education was stressed and where going to church was stressed?

A. Yes.

Q. Now, you recite in your report the history and you testified this morning the history of Edward Bell's employment in Jamaica.

A. Yes.

Q. I believe in your report, you state that you actually reviewed the pre-sentence report that was prepared in this case; is that correct?

A. Yes.

Q. So you must know then, isn't this true, that in the pre-sentence report, he has a very different history of employment in this country.

A. Yes.

Q. So doesn't that essentially show that once he came to this country, for whatever reason, he then began **[197]** getting into trouble and was fired from jobs for his belligerence and for his failure to abide by rules.

A. That has to be put in a context as to the nature of the employment and how well he was able

to perform the tasks that were required of him. I cannot ignore the fact that a monotonous job, such as making hundreds of banister railings and having no problems doing that and when he's here where he is required to work on machinery, and if he's extremely slow in doing whatever he's doing and that causes problems among his workers, that it would lead to frustration because I had spoken to him about that.

Q. Isn't it a fact that in the pre-sentence report, the descriptions include a description of him where he was required to give a drug screen test, urine test, and he apparently used someone else's urine for that test and got into trouble for it and then refused to give a clean screen and then was fired for that. Isn't that correct?

A. Yes, I did read that.

Q. That has nothing to do, does it, with monotony or following rules, does it?

A. No.

Q. Or not being able to understand what the rules are.

[198] The letter that you've referenced from the Port Antonio hospital, you have no confirmation, do you, of why he was in the hospital?

A. Pardon me?

Q. You have no confirmation, do you, from the hospital of why he was in the hospital?

A. It says blunt injury to the left eye.

Q. Was any of his family able to confirm any of that?

A. I spoke to the young man who was the person who hit him in his head.

Q. That's not my question.

A. No, I asked the family if they recalled it and they said they did not recall it.

Q. Did you investigate his record of convictions and bad acts in the United States?

A. Yes, I saw that.

Q. That was not included in your report though, was it?

A. I included in my report that his record here was replete with traffic violations.

Q. Did you include in your report the fact that he threatened police officers, to kill them, when he was in jail?

A. I did not get that information.

[199] Q. You didn't get the information?

A. No.

Q. Did you include in your report the fact that he was convicted of carrying a concealed weapon?

A. No, I did not put that in my report.

Q. Did you put in your report the various domestic violence that he perpetrated against his girlfriends here in the United States?

A. Well, as I indicated, I could not have done a complete and comprehensive investigation given the time that I had and the information that I had would, of course, have required further investigation. But to the degree that I was able to get information that could have been mitigated, that is what I had obtained.

Q. Were you directed not to put any details of aggravating evidence in the report?

A. No, I was never instructed to do anything like that.

Q. Along those lines, you believe, don't you, that you need a year to investigate a case?

A. I believe it takes a good year or so.

Q. A year or so.

A. Uh-huh.

Q. One of the things that you note in your report is that you believe that mitigating evidence could have **[200]** been used in the sentencing phase of Bell's trial in order to present evidence of residual doubt about his guilt; isn't that correct?

A. Yes, I had put that in.

Q. Are you aware of the fact that in Virginia, such evidence is inadmissible?

A. Yes.

Q. Now, the shirt-tearing incident that occurred in Jamaica that has been referred to as, you are aware, aren't you, that it was not just a destruction of property conviction, but also an assault conviction? Are you aware of that?

A. Yes, that they were fighting.

Q. Are you aware that that was based upon actual injury to the other man?

A. Yes, I was told that they were fighting.

Q. And you're aware of the fact they weren't boys. They were 20 or 21 years old.

A. Yes. Based on the time it happened, he would have been 20 years old when this took place.

Q. Now, you say in your report that Bell was a loving father to his children. Are you aware of the fact that the officer whom he murder, Officer Timbrook, left a widow who was pregnant at the time?

A. I was informed that the officer's wife was **[201]** pregnant at the time.

Q. So you are aware of the fact it was Edward Bell's acts that prevented Officer Timbrook from ever being able to be a loving father.

A. Based on the conviction.

Q. Based on the fact that he murdered Officer Timbrook.

A. Yes.

Q. Are you aware of the fact that the term going to the race track or coming from the race track in Charlestown, West Virginia, in this area of the state, is code for dealing drugs?

A. No.

Q. Did you ever obtain any school records?

A. I was able to get letters from the schools where he attended, but the actual records, they did not have.

Q. No longer exist? How about employment records? I'm talking about documentary records.

A. The only thing that I had was the record from social security earnings and also from the pre-sentencing report.

Q. I was going to say, that's reflected in the pre-sentencing report, isn't it?

A. Yes.

Q. That information. You also weren't able to **[202]** obtain any medical records, were you, apart from that letter?

A. No, no, because the records have been destroyed.

Q. Did you pursue any assistance through the Jamaican Embassy here in the United States and in Washington?

A. No, I did not.

Q. Are you aware his trial attorneys did do that?

A. I'm not aware too much exactly what was done and the process. I was focussing on getting whatever information I could by going to the country myself and seeing what I could get there.

Q. Now, the affidavits that you obtained in Jamaica and I believe, correct me if I'm wrong, you testified this morning they were obtained over a period of two days?

A. Yes, or three days.

Q. Are you aware they're all dated the same date, May 9?

A. That's when the justice of the peace, she was with us for one day. But in terms of gathering the information, it took three days. But she was with us for one day. So it was when they signed was when it was stamped. That was the day that it was stamped.

Q. That must have been a pretty full day.

[203] A. Yes.

Q. You had 15 witnesses all executing affidavits on the same day, is that correct?

A. Yes. That's what we had to do. That's the time that we had.

Q. So you and your husband wrote the affidavits, is that correct?

A. Yes, we typed up the information that was provided to us.

Q. And you told these witnesses when you were interviewing them, didn't you, that you were trying

to get Edward Bell off of death row, that he had a death sentence in the United States, didn't you?

A. I did not say to them that I want to get him off death row. I told them that I was there as a social worker and I'm trying to get information about Edward Bell as they knew him in Jamaica. And they knew that he had been sentenced to death and they knew that I was working on providing information that could be used at his trial. But I did not specifically say we are trying to get this information to get him -- not in those exact terms. But the understanding was there I would be working with his attorney, giving him assistance.

Q. Thank you.

You've said that it's important to present to the **[204]** jury the life history of the defendant; is that correct?

A. Yes.

Q. But it's not your job, is it, to determine what evidence gets put on and what evidence does not get put on.

A. No.

Q. That's up to the lawyers.

A. That is up to the lawyers.

Q. When you went to Jamaica, can you tell me what your approximate costs were for going to Jamaica?

A. My airfare was under $400.

Q. How long were you there?

A. I was there for five days. I left Friday and I returned Wednesday.

Q. And Mr. Bell's current lawyers have paid your expenses for all of that, haven't they?

A. Yes.

Q. Do you know how much that total was?

A. You mean for the airfare, et cetera?

Q. For all of your expenses in the whole evaluation, for all of your work.

A. For all of my work? I really don't know exactly how much it is. I know I have spent at least 200 hours since I started working on this case, going to Jamaica, writing the report, meeting with family, meeting with **[205]** the attorneys, et cetera.

Q. You make $100 an hour?

A. Yes.

Q. Unless my math is wrong, is that $20,000?

A. Yes, that would be about right.

Q. And it may be more than that?

A. I don't know. I can't say because I've not been keeping tabs.

Q. When you talked to Dawn Jones who was his girlfriend in West Virginia, and she told you about the incidents of domestic violence, is that correct?

A. Yes.

Q. Did she also tell you how he brandished a gun during an argument in her presence?

A. Yes.

Q. You said that you spoke to two police officers in Jamaica who both said that Edward Bell was peace-loving or something along those lines?

A. Yes.

Q. Did you inform those police officers that he had murdered a police officer here in the United States?

A. I am sure that they were told of the incident, of what he was convicted of.

Q. Did they know that he shot the police officer in his head?

[206] A. The prevailing attitude towards that was that this was totally out of character and so --

Q. I'm sorry. I didn't hear you.

A. Was totally out of character.

Q. Did you inform them that he had, Edward Bell had bragged to his friends that he thought that Officer Timbrook should die and that he should be shot in the head because he usually wore a bullet proof vest? Did you tell these police officers that?

A. I was not informed of that.

Q. So did you tell these police officers he had threatened other officers here in the United States when he was in jail?

A. I was not aware of that.

Q. Now you said that his representation in the community in Jamaica was respectful, trustworthy, kind, not violent; is that correct?

A. Yes.

Q. So isn't it a fact that whatever he was in Jamaica, when he came to the United States he changed pretty drastically, didn't he?

A. I cannot sufficiently answer that question because as I said before, my investigation has just not been as comprehensive as I would like it to be. So until I could do that, I would not be able to make that **[207]** assessment.

Q. You can certainly make that assessment, can't you, because you know what he did when he came to the United States. You know that he murdered a

police officer. You know he threatened officers. You know he carried guns. You know he dealt drugs. You know all of that, don't you?

A. I do not know that. I do not know that.

Q. You don't know that. Well, I'm going to instruct you that that is the fact in this case and ask you, doesn't that make a difference in your assessment that he was respectful, trustworthy, kind and not violent?

A. Yes, if he, in fact, is what you said here, that clearly would be different from the person that I was told about in Jamaica.

Q. Thank you. Now you interviewed his ex wife in Jamaica, Barbara, and she said he was a good and loving husband. But she didn't think he was such a good husband, did she, after he took up with other women here in the United States.

A. I was imagine she would not.

Q. He wasn't a good husband or loving husband to her when he did that, did he?

A. I would imagine she would feel that he was not.

Q. You said you spoke with one of his girlfriends **[208]** here in the United States, Tracy?

A. No, I did not speak with Tracy.

Q. I thought you said you did.

A. No, I spoke with Tracy's mother.

Q. To Joanne Nicholson.

A. Yes.

Q. And she reported that Edward Bell was a loving father, is that correct?

A. Yes.

Q. But Edward Bell never provided any child support, did he?

A. That's not what she indicated to me. She said he provided as best he could. She said he always made sure there was Pampers and milk there.

Q. I think your report said he gave them gifts and whatever they needed along those lines, but he provided no financial child support. You know what child support is.

A. Yes, I do know what child support is.

Q. He did not provide any of that to any of these children, did he?

A. I was not informed of that. I was told he was a supportive father.

Q. Did you ask if he provided child support?

A. I was informed that he provided for his children **[209]** to the best that he could.

Q. Did Joanne Nicholson tell you that Edward Bell had assaulted her daughter, Tracy? Are you aware of that incident that was presented to the jury at trial of where he assaulted her, quite brutally?

A. She said that they had problems. She did not go into any details with me.

MS. BALDWIN: No further questions, Your Honor.

THE COURT: Thank you.

Any further questions?

MS. SAUNDERS: Just brief redirect, Your Honor.

REDIRECT EXAMINATION

BY MS. SAUNDERS:

Q. Ms. Albarus, counsel asked you about the shirt-tearing incident in Jamaica. Did you talk to witnesses to that incident?

A. Yes.

Q. Did they report any injury to you?

A. No. They said it was a scuffle between two young boys and the shirt -- the thing they stressed was the tearing of the new shirt.

Q. You've also testified that some people may have interpreted Bell's actions as lazy. Do you think based **[210]** on the investigation you conducted that that perception is accurate?

A. No, I could not say that at all.

Q. Could the perception of him as lazy be connected with cognitive impairment?

A. That would be my belief.

Q. Ms. Albarus, in your cases in Virginia state court, have your expenses as a mitigation investigator been paid for by the Court?

A. Yes, they have been.

Q. What types of expenses were included in that payment by the Court?

A. Everything related to the work that I do, the hours that I expended. I was paid for an hourly rate and my travel to Jamaica, my hotel, my car. I usually don't charge for meals.

Q. How much time did you expend in the case in Virginia state court in which your expenses were paid for by the Court?

A. You mean, in state court?

Q. Yes.

A. On the Malvo case?

Q. Right.

A. I would say about $20,000. How much time I spent on that case? I would say about 7 to 800 hours. I [211] wasn't paid for everything. After a while, the judge said, no more.

Q. But the judge paid for a substantial portion.

A. Yes, a substantial portion of it, yes, was paid.

Q. Ms. Albarus, did you talk with Mr. Bell's family members in Virginia?

A. Yes, I did.

Q. Did you talk with Mr. Bell's associates in Virginia?

A. Yes.

Q. How did they describe Mr. Bell?

A. It was pretty consistent. I spoke with a friend who was also a co-worker who said that he was a very generous person, he was kind. The information that I got was pretty much consistent.

Q. When you say the information is consistent --

A. About his character, about the kind of person that he was; that he was kind, that he was trustworthy, that he loved his kids. That was the information that I received.

Q. Ms. Albarus, have you ever found that it sometimes takes more than one interview to understand a client's background?

A. It takes several interviews.

Q. Of the same person?

[212] A. Of the same person. Sometimes you get information and then you get something else and you've got to go back and you've got to corroborate. So it really is a process. That is why it takes as long

as it does. It cannot be done in six to eight weeks. I tried to do whatever I could in this situation here.

Q. If you're aware that there may be negative information from a witness or in a record, do you not interview that person?

A. Yes, you try your best to interview everyone because everything has to be put within the context of the person's life.

Q. In your experience, can there be mitigation evidence even when somebody may have committed a terrible crime?

A. Yes.

Q. Why?

A. Because factors in the individual's life really sort of inform their choices and how they go about their lives and that is the whole purpose of doing a mitigation investigation.

Q. Ms. Albarus, based on what you were able to accomplish given the time constraints, were you able to identify substantial mitigation factors and mitigation evidence during the course of your investigation?

[213] THE COURT: Ms. Saunders, I think she's already indicated and we're going beyond redirect examination here. Do you have any further questions?

MS. SAUNDERS: No further questions, Your Honor.

MS. BALDWIN: Nothing further, Your Honor.

THE COURT: May this witness be excused?

MS. SAUNDERS: Yes, Your Honor. Thank you.

Counsel, we're going to take a short recess at this time.

(Recess at 3:30 p.m. until 3:45 p.m.)

Very well. You may call your next witness.

MR. CONNELL: Thank you, Your Honor.

Dawn Jones.

DAWN JONES, CALLED AS A WITNESS BY PETITIONER, SWORN.

DIRECT EXAMINATION

BY MR. CONNELL:

Q. Ms. Jones, pull that microphone right up to you. I know you have laryngitis and we've had trouble hearing people.

Could you please state your name and spell your last name for the Court Reporter?

A. Dawn Elizabeth Bailey, B-a-i-l-e-y.

Q. Was your name once Jones?

[214] A. Yes.

Q. How old are you, Ms. Bailey?

A. 31.

Q. What's your address?

A. 11 Margaret's Way, Martinsburg, West Virginia.

Q. How long have you been lived at that address in Martinsburg?

A. Approximately two years.

Q. Where did you live before that?

A. I lived at 326 East Burke Street.

Q. What city was that?

A. Martinsburg.

Q. That's also West Virginia?

A. West Virginia, yes.

Q. Did you live at 326 Burke Street, Martinsburg, West Virginia, in the year 2000?

A. Yes.

Q. How are you employed, ma'am?

A. I am a government contractor for the Alcohol, Tobacco and Firearms Bureau.

Q. When did you meet Eddie Bell?

A. I met Eddie in, I believe it was 1993.

Q. Did a relationship develop?

A. I'm sorry?

Q. Did a relationship develop?

[215] A. Yes, sir.

Q. At that time, how would you describe what Mr. Bell was like?

A. Eddie was very sweet, real charming.

Q. What kind of relationship did you have? Were you dating?

A. Yes, we dated for quite a while.

Q. During the course of that relationship, did you ever buy presents for Mr. Bell?

A. Yes, all the time.

Q. Did you ever buy him any jewelry?

A. Yes, I bought him jewelry all the time. He loved jewelry.

Q. What sort of jewelry did you buy him?

A. I bought him a gold watch, several gold chains, several rings, earrings.

Q. In 1994, did you become pregnant?

A. Yes.

Q. Did you also get sick?

A. Yes.

Q. What happened?

A. I developed toxemia.

Q. What did Mr. Bell do?

A. Eddie was there a lot. He took care of me when I couldn't work.

[216] Q. What sort of things did he do around the house for you?

A. He likes to cook, so he would cook and keep the house clean and go to work.

Q. Would you say that he was lazy around the house?

A. No.

Q. Did you have a child?

A. Yes.

Q. What is your child's name?

A. Kydesha.

Q. How old is Kydesha now?

A. Eleven.

Q. Was she born prematurely?

A. Yes, sir.

Q. Where was Mr. Bell working at that time?

A. Rocco.

Q. That's R-o-c-c-o, Rocco?

A. Yes.

Q. What kind of place is Rocco?

A. I believe Rocco is a chicken factory.

Q. When you were in the hospital, what hospital were you in?

A. City Hospital, in Martinsburg.

Q. Where was Kydesha taken?

A. Winchester Hospital.

[217] Q. During that time when you were both in the hospital, was there a time you were looking for Mr. Bell and couldn't find him?

A. Yes. One evening, I was wondering why I hadn't seen Eddie. It was time for him to get off work. I called the hospital to check on Kydesha and Eddie was at the hospital.

Q. He was at the hospital in Winchester with Kydesha.

A. Yes, sir.

Q. Who was the relationship like after Kydesha was born?

A. We had a pretty good relationship. Kydesha was really sick so we spent a lot of time taking Kydesha to the doctor and the hospital.

Q. Was there ever any domestic violence in the relationship?

A. We had a few arguments, just like other relationships.

Q. Would you say that those arguments characterize the relationship?

A. No, I wouldn't say that.

Q. Did Bell provide for you and for Kydesha?

A. He did what he could do.

Q. What was that? What did he do?

[218] A. I was off of work from when I was seven months pregnant, so he took care of paying the household bills and giving me money when I had to go to the doctor.

Q. Did there come a time when Mr. Bell's mother got sick?

A. Yes, sir.

Q. What happened?

A. I believe she had a brain aneurysm.

Q. And where were you and Mr. Bell when that happened?

A. When it happened, we were living on Raymer Court in Martinsburg and we got a phone call in the morning that she was sick and taken to the hospital.

Q. What did Mr. Bell do?

A. He was very upset. He kind of broke down into tears. I took him -- I took my daughter to my mother first and then took him to the hospital.

Q. What happened when you got to the hospital?

A. I remember seeing the look on Mr. Bell's face when we opened the elevator up. I think Eddie saw him too and they just both were in tears.

Q. Did that experience in your experience with Mr. Bell, and by Mr. Bell, I mean Eddie, not his father, Oswald, did that change Mr. Bell, that experience?

A. Eddie was real different after his mom got sick. **[219]** He had a good relationship with her and he was just kind of strange after that.

Q. Eventually, your relationship with Mr. Bell ended, correct?

A. Yes.

Q. And what was Mr. Bell's relationship with Kydesha like after your dating relationship ended?

A. Eddie would pick Kydesha up on the weekends and then bring her back on Monday.

Q. How would you characterize him as a father to Kydesha?

A. I would say he was a good father to Kydesha because she loved going with Eddie. All she did was talk about what they did when they was together, when she was gone.

Q. How would you characterize Mr. Bell's relationship with Kydesha? We know Kydesha enjoyed it.

A. I'm sorry?

Q. How would you characterize the way Mr. Bell acted toward Kydesha?

A. He would initiate the pick-ups. He would call me and say, I'm coming for Kydesha today and I'll bring her back on Sunday.

Q. Shortly after your relationship with Mr. Bell ended, was there an incident where you called the police **[220]** on him?

A. Yes.

Q. Who else was present at that incident?

A. Patrick.

Q. Patrick Morrison?

A. Yes.

Q. How long after you split up with Mr. Bell was that?

A. It was a few months.

Q. What happened?

A. Eddie came to visit me one evening and Patrick was at my house and they got into an argument.

Q. What was the nature of the argument?

A. I guess because Patrick was at the house.

Q. Did Mr. Bell have a gun with him?

A. Yes.

Q. Did he point it at Patrick Morrison or anybody else?

A. No, he just kind of pulled it and held it to the side.

Q. Did he threaten anyone directly?

A. No.

Q. Did he injure anyone?

A. No.

Q. Was that gun a pearl-handled gun?

[221] A. No.

Q. How do you know?

A. I know because I was with him when he purchased the gun.

Q. Did you become friends with Mr. Bell again after that?

A. Oh, yes.

Q. What was your relationship like after that incident?

A. After that, me and him, we used to talk on the phone. If he needed a ride and I was where I could go get him, I'd pick him up and he'd pick Kydesha up on the weekends or sometimes in the summer, he'd take her for a week or two.

Q. Would you say you respected him?

A. Yes.

Q. Why was that?

A. Because he made an effort to be a good father to her.

Q. You knew when Mr. Bell was arrested for the charge of murder, correct?

A. Yes.

Q. You knew when he was on trial?

A. Yes.

Q. Did the police ever come and interview you?

[222] A. The police came to my house and I wasn't at home. They left a few messages. Finally, they tracked me down at my sister's.

MS. HARRIS: I need to object on the basis of hearsay.

BY MR. CONNELL:

Q. I'll get to the actual point.

Did you go down and speak with the police?

A. Yes.

Q. Did they subpoena you to trial?

A. Yes, to the sentencing trial.

Q. Did any -- even though you were subpoenaed to the sentencing trial, did any defense attorney or anybody else from that defense team ever contact you?

A. No -- I'm sorry. They called me on the phone but no one ever directly came.

THE COURT: What do you mean they called you on the phone?

THE WITNESS: The one attorney called me and asked me a few questions and that was all.

THE COURT: What did he ask you?

THE WITNESS: I don't remember every single thing he asked me because it's been a while, but I remember him asking me about Kydesha, my daughter, and I remember him asking me about what kind of person I [223] thought Eddie was at the time.

THE COURT: What did you tell him?

THE WITNESS: I told him we had a daughter together and Eddie and me had a good relationship, we were friends, we weren't enemies.

THE COURT: Do you remember who the attorney was?

THE WITNESS: No, I don't.

THE COURT: But he said he was an attorney for Eddie.

THE WITNESS: Yes, sir.

THE COURT: You knew that Eddie was being tried for murder.

THE WITNESS: Yes, sir.

THE COURT: You knew about the details of what he was charged with.

THE WITNESS: Yes, sir.

THE COURT: You knew that the state was seeking the death penalty.

THE WITNESS: Yes, sir.

THE COURT: Did you ever try to contact the attorneys for Eddie and tell them that you would like to tell the jury about Eddie being a good father and about his good qualities and helping them make a decision?

THE WITNESS: No, sir, I didn't.

[224] THE COURT: Why not?

THE WITNESS: I assumed they would contact me. Because they had called, I assumed once the trial started, they would call me to testify.

THE COURT: But they didn't. You knew that they didn't issue a subpoena for you.

THE WITNESS: Right. But when I spoke with the lawyer, he said they would contact me later. So I just assumed that later meant when the trial was going on.

THE COURT: Okay.

Go ahead.

BY MR. CONNELL:

Q. Ms. Bailey, actually, were you subpoenaed to the trial?

A. To the sentencing trial, yes.

THE COURT: She said by the prosecution. I asked if she was subpoenaed by the defense and she said no.

BY MR. CONNELL:

Q. The attorney who contacted you, was his name John Sheldon?

A. I'm not sure. It may have been.

Q. You actually came to testify, is that right?

A. Yes, sir.

[225] Q. You testified under subpoena at the sentencing hearing?

A. Yes.

THE COURT: Let's get back to this.

Do you think that you were contacted by this attorney for Mr. Bell before you testified at Eddie's sentencing or after or can you remember?

THE WITNESS: I was contacted before because I remember waiting and then I remember hearing the verdict on the news and then getting -- he wrote a note on my door, saying that he wanted me to call him. It wasn't the attorney, but it was the police from where I live. I called the number and he gave me another number to some gentleman in Virginia at the police station who told me when to appear in court for the sentencing hearing.

THE COURT: And it was before all of that that a lawyer for Eddie had contacted you.

THE WITNESS: Yes, sir.

BY MR. CONNELL:

Q. You testified, is that right?

A. Yes, sir.

Q. What questions did the defense attorneys ask you?

A. They just asked me who I was and --

Q. I'm sorry. Did the defense attorneys, Eddie's **[226]** attorneys, ask you any questions?

A. Eddie's attorneys never asked me anything.

Q. What was your reaction to that?

A. I was surprised because I thought if the prosecution would ask me something, the defense surely would come back so I would be able to say Eddie is a good person, the way I feel about Eddie.

Q. Would you at that time have liked to have testified about Eddie's good points?

A. Sure.

Q. If they had asked you the same questions I've asked you today, how would you have answered?

A. My answers would be the same.

MS. HARRIS: I'd like to object. I think she's speculating on what she's surmising her testimony would have been at that time.

THE COURT: I don't believe so. I'll overrule the objection.

BY MR. CONNELL:

Q. If you had been asked about the impact of this whole tragedy on Kydesha, in that words, what is the impact of this whole tragedy, what would you have said?

A. Kydesha loves her father very much.

MS. HARRIS: I'd like to object again on the basis of hearsay, plus how can she say what the impact [227] necessarily will be on Kydesha?

THE COURT: I'll overrule it. It's her mother.

Go ahead.

BY MR. CONNELL:

Q. Do you need me to repeat the question?

A. No. Kydesha loves her father very much. She gets very upset when someone is talking about her father because she can't see her father like she would have liked. It would have had a very bad effect on Kydesha.

Q. If someone had asked you the question of what impact would an execution have on Kydesha, what would you have said?

A. I wouldn't even want to speculate. Kydesha is sensitive about Eddie. She loves it when he calls her on the phone. She likes to write him letters. I'm sure Kydesha would be devastated.

Q. You more recently spoke with an investigator about the case?

A. Yes, sir.

Q. If Mr. Bell's trial attorneys had come and met with you or had asked you these same questions, would you have given them the same answers?

A. Yes, sir.

MR. CONNELL: If you'd answer any questions [228] the Attorney General has.

CROSS-EXAMINATION

BY MS. HARRIS:

Q. Good afternoon, ma'am. Ms. Jones, turning your attention back to July 1, 1997, you spoke to Mr.

Connell about an incident at Dodson's trailer park and you were living there at that time?

A. Yes, ma'am.

Q. You said that Bell came into the building there. Was he invited? Were you surprised to see him?

A. I was surprised to see him there, but I opened the door.

Q. You say that he had a firearm?

A. Yes, ma'am.

Q. You say that he didn't point it at you?

A. No.

Q. Did he point it at Morrison?

A. No.

Q. Did he talk about why he was there with the gun?

A. He didn't come in the house with the gun out. He came in the house and asked what was going on and then the argument started.

Q. You say that he didn't point the gun. Did he wave it around?

A. No, he just kind of had it at his side and he was **[229]** arguing.

Q. Were you afraid?

A. Well, of course I was afraid.

Q. You say that you had a few arguments. You said that they were just typical arguments?

A. Yes.

Q. But he hit you, didn't he?

A. Yes, he has.

Q. How many times did he hit you?

A. I'm not sure. I wasn't counting.

Q. Did he ever break the skin?

A. No.

Q. Did you ever go to the hospital?

A. No.

Q. Did you go see a magistrate?

A. No.

THE COURT: Let me ask you this, ma'am. Was this on more than one occasion where you had an argument that he hit you or used physical force against you?

THE WITNESS: Yes.

THE COURT: How many times would you say that you had a physical altercation or that he hit you in some way?

THE WITNESS: Maybe three or four.

THE COURT: Three or four times. This was **[230]** over -- what period of time were you all together?

THE WITNESS: Five years.

THE COURT: Five years.

THE WITNESS: Yes.

THE COURT: Go ahead.

BY MS. HARRIS:

Q. Ms. Jones, I think you mentioned that you met Bell in 1993?

A. Yes.

Q. Then you became aware that sometime during that year, he went back to Jamaica?

A. Yes.

Q. And married Barbara Williams?

A. Yes.

Q. When did you become aware of that?

A. I'm not sure of the exact date, but it was in '94 because I was pregnant with Kydesha.

Q. It was subsequent to your pregnancy with Kydesha?

A. Yes.

Q. Then did there come a time where he came back to the United States and y'all were together again?

A. Yes.

Q. By that way, did you live together?

A. Yes.

Q. You say at some point, the relationship ended?

[231] A. Yes.

Q. Do you remember when that was?

A. No, ma'am, I don't.

Q. When you say the relationship ended, because later you said you were still friends at some point, but when you said the relationship ended, does that mean you stopped living together?

A. Yes.

Q. But you can't recall exactly when that was?

A. No, ma'am.

Q. You said during the time that Kydesha was convalescing in the hospital and I think you said that you suffered with toxemia and you say he was in the household and paid household bills?

A. Yes.

Q. Did he provide child support?

A. He lived with me, so yes.

Q. Then when the relationship ended and he moved out, did he ever pay child support?

A. Yes, he used to give me money.

Q. But was there ever --

A. There was no written order.

Q. You did not regularly receive a sum of financial means to support Kydesha, did you?

A. I didn't receive it every week, but he took care **[232]** of her.

Q. Did there come a time when you told, I guess it was Ms. Albarus, that Eddie had a way of -- he had a need to have control in the home?

A. Yes.

Q. That he needed to have his way and that he was a funny sort of person that way?

A. I'm sorry?

Q. That he was very particular about having things done in a certain way in the house?

A. Well, he liked things in order, yes.

Q. Did that result in any kind of tension or conflict in the house?

A. Just like every other relationship, I would guess so.

Q. But you say that -- but you cannot remember when it was that he moved out of the house?

A. I don't know the exact date because we would break up and get back together.

MR. CONNELL: Objection; asked and answered. I think this is the third time this question has been asked.

THE COURT: I believe that's right. I'll sustain the objection.

BY MS. HARRIS:

[233] Q. Then real quickly, Ms. Jones, you testified to living with Eddie Bell for a while. Were

you aware during that time that he was a drug dealer? Were you aware of that?

A. No.

Q. And were you ever aware that he had threatened police officers while in the jail? Were you aware of that? You said you remained friends, he called you from time to time and Kydesha looked forward to hearing from him.

A. No, I didn't know that.

Q. Were you also aware that he also had domestic violent disputes with another girlfriend following you? Were you aware of that?

A. I'm not going to say I was totally unaware, but I heard through hearsay, so.

MR. CONNELL: Objection, Your Honor.

THE COURT: I'll overrule the objection. She's already answered it.

Go ahead, ma'am.

BY MS. HARRIS:

Q. Finally, you said that you were aware at some point that he left in 1993 to marry Barbara Williams. Were you aware that he had a child there?

A. Yes, I was aware he had a child there.

[234] Q. And he came back and basically had abandoned that child in Jamaica.

A. I'm sorry?

Q. Were you aware that he had a child in Jamaica when he came back to the United States?

A. Yes. He had a child before he came.

Q. Yes, ma'am.

MS. HARRIS: That's all, Judge.

THE COURT: Any further questions?

MR. CONNELL: I do have some, Your Honor.

REDIRECT EXAMINATION

BY MR. CONNELL:

Q. You were asked by the Attorney General about child support. During the time that you lived with Mr. Bell, was there any reason for him to pay child support?

A. No.

Q. During the time that you lived with him, did he provide for Kydesha?

A. Yes.

Q. After you two split up, did he continue to provide money for Kydesha?

A. Yes.

Q. Did you ever feel he wasn't meeting his obligations so you had go to a court and get a court order?

[235] A. No, that's why I didn't go.

Q. Why didn't you go to court?

A. Because I thought he was doing the best he could do.

Q. You were asked about were you aware Mr. Bell was a drug dealer. You were asked that question on cross-examination. Did you ever see Mr. Bell sell any drugs?

A. No.

Q. Did you ever see him keep any large stashes of drugs in your houses?

A. No.

Q. Did you ever see him -- did people ever come to your house to buy drugs?

A. No.

Q. Did you ever see anything that would indicate to you that he was a drug dealer?

A. No.

Q. Did the fact that he had on jewelry mean that he was some sort of flashy, rich drug dealer?

A. No, because I purchased most of that jewelry.

Q. You were asked about if you were aware Mr. Bell threatened any police officers. Did you ever hear Mr. Bell threaten any police officers?

A. No.

[236] Q. Did you ever hear him talk bad about any police officers generally?

A. No.

Q. Did you ever hear him talk bad about Sgt. Timbrook in particular?

A. No.

Q. Did you ever see him or hear him make any comments that were threatening toward authority figures in general?

A. No.

Q. You were asked about domestic violence. Did you ever see Mr. Bell commit domestic violence against any other person?

A. No.

Q. You were asked if you were aware, and the question was a little odd so I wasn't sure what your answer was, but if Mr. Bell had abandoned his child in Jamaica. Do you remember that question?

A. I thought I heard that, but I wasn't sure.

Q. Were you saying Mr. Bell had abandoned his child in Jamaica?

A. No, I was not.

Q. When we say his child in Jamaica, we mean Kamille Bell, right?

A. Yes.

[237] Q. Have you ever met Kamille?

A. Yes.

Q. How did you meet Kamille?

A. Kamille came to spend the summer with her grandparents.

Q. Where was that?

A. In Virginia.

Q. During that time, did Kamille ever come over to meet her half brothers and sisters?

A. Yes, I brought Kydesha to meet her and they spent almost two weeks together.

Q. Kydesha and Kamille?

A. Yes.

Q. Did you get the impression Kamille was abandoned in any sense?

A. No, not at all.

MR. CONNELL: Thank you very much.

THE COURT: Anything further?

MS. HARRIS: Just real quickly, Judge.

RECROSS-EXAMINATION

BY MS. HARRIS:

Q. Ms. Jones, you mentioned you did not press the issue of child support because you felt Eddie Bell was doing the best he could.

A. Yes.

[238] Q. Isn't it true you also mentioned or described for Ms. Albarus, a number of friends you felt were encouraging you or advocating that you file

for child support and that you just, for whatever reason, did not want to?

A. I didn't do it because I thought he was doing the best he could do.

MS. HARRIS: That's all, Judge.

THE COURT: Thank you, ma'am. You may step down.

May this witness be excused?

MR. CONNELL: Yes, Your Honor.

THE COURT: You may be excused, ma'am.

MR. CONNELL: May I have 15 seconds to check the hallway?

THE COURT: All right.

MR. CONNELL: Your Honor, our next witness is Joanne Nicholson.

JOANNE NICHOLSON, CALLED AS A WITNESS BY PETITIONER,

SWORN

DIRECT EXAMINATION

BY MR. CONNELL:

Q. Ma'am, could you please state your name and spell it for the record?

A. Joanne Nicholson; J-o-a-n-n-e, N-i-c-h-o-l-s-o-n.

[239] Q. Where do you live, ma'am?

A. I live at 302 North Kent Street.

Q. What's your relationship --

THE COURT: What city?

THE WITNESS: Winchester, Virginia.

BY MR. CONNELL:

Q. What is your relationship to Eddie Bell?

A. I am Eddie's grandchildren's grandmother -- Eddie's children's grandmother.

Q. Where are his children seated in the courtroom?

A. The three right there with Christine.

Q. Starting from your left, would you introduce the children to us, please?

A. The first one to the left is D'Antre.

Q. Could you spell that for us?

A. D-i-o-n-t-r-e. The second one is Edward, Jr. The third one is Xavian.

Q. Could you spell that for us?

A. X-a-v-i-a-n.

Q. Thank you very much.

Can you see a picture in front of you?

A. Uh-huh.

Q. Your Honor, I'm not going to move this in because this picture is part of the record in the federal appendix.

[240] About when was this picture taken?

A. I guess EJ was probably about four. Xavian might have been three, Diontre, two, or maybe a little younger than that.

Q. About what year would that put it?

A. Well, EJ was born in '99, Xavian was born in '98 and Diontre was born in '99.

Q. 2000, 2001?

MR. WITMER: I'm going to object unless we can see relevance here soon.

THE COURT: It seems very relevant to me. I'll overrule the objection.

BY MR. CONNELL:

Q. Just because we have a record and not everybody can see this, can you tell us who the three children pictured in this picture are?

A. They're Edward's, Eddie's children.

Q. When did you first meet Eddie Bell?

A. I guess around 1994.

Q. Did there eventually come a time when you were living in the same house with him?

A. Yes.

Q. During that time -- you are Tracy Nicholson Evan's mother?

A. Mother.

[241] Q. During that time that you were living in the same house with Mr. Bell, what was he like?

A. Very nice, very respectful toward me and very loving father toward the kids.

Q. Did he live with you before the birth of his first son?

A. Yes.

Q. Could you tell us a little bit about that?

THE COURT: About what?

BY MR. CONNELL:

Q. I'm sorry; about the birth of his first son.

A. Well, I've got a bunch of granddaughters and I never had a grandson. So Eddie and I used to talk about, you know, first grandson. So when EJ was born -- that's what we call him because it's Edward Junior -- when he was born, Eddie called me on the phone. Eddie was crying and I was crying because we got the boy.

Q. What was he like as a provider to the children?

A. Very good provider. I mean, he always made sure they had their formula, their diapers, anything they needed.

Q. What kind of -- in addition to providing material things, what kind of child care did he provide to them?

A. I would say Eddie probably changed diapers and bottles and things like that about as much as Tracy and **[242]** I did.

Q. Overall, what was he like as a father to the children?

A. Very good, very good father, very caring father.

Q. Who is Lalyse, L-a-l-y-s-e, Nicholson?

A. That is my oldest granddaughter. Eddie raised her.

Q. Is she biologically related to Eddie?

A. No.

Q. What was his relationship with Lalyse?

A. Like I said, he was more of a father to Lalyse than her own father. He was always there for her. He took her to school. He done everything for her.

Q. What was Bell's relationship with Tracy, your daughter, like?

A. They had a good relationship. They argued like other couples, you know, but they're relationship all together was all right.

Q. Let's talk about those arguments. During those arguments, was there domestic violence?

A. I never seen any.

Q. How often were you in the house when they were arguing?

A. Not too often, but when they did, I'd intervene sometimes.

[243] Q. Did you see Mr. Bell hit Tracy?

A. No, never.

Q. When you intervened, how did Mr. Bell react?

A. Well, she'd go her way, Eddie'd go his way.

Q. Now, do you know a woman named Billy Joe or Jody Swartz that testified in the trial of this case?

A. Yes, I do.

Q. Was there a time -- were you present for an incident involving Tracy, Mr. Bell and Billy Joe or Jody Swartz?

A. Yes.

Q. Could you tell us what happened?

A. Yeah. We call her Jody. Her relatives called Tracy one night at home and told Tracy that she was with Eddie and told Tracy exactly where Eddie and Jody were. They were right across the street from her relatives' house, parked in an alley. Tracy asked me if I would take her there. Well, I was kind of a little hesitant because Tracy was pregnant at the time. But anyhow, I took her and we approached Eddie and Jody. Of course, there was words exchanged and everything. No physical contact or nothing, just words exchanged. Eddie kind of got in between Jody and my daughter. Jody got back in the car. Me and Tracy got back in the car and we left.

Q. Were you actually present for that?

[244] A. Yeah, I was standing right outside my car and watched the whole thing.

Q. During the course of that, did Mr. Bell use a gun on Ms. Swartz?

A. No, there was no gun, no physical contact, no nothing like that.

Q. During the course of that, did Mr. Bell strike Tracy?

A. No.

Q. During the course of that, did Mr. Bell strike Billy Joe Swartz?

A. No.

Q. During the course of that -- and I apologize for asking you this question -- but during the course of that, did Mr. Bell reach inside Mrs. Swartz's underpants and check her vagina to see if she'd been with another man?

A. Not that I'm aware of.

Q. Did he ever reach down her underpants or anything like that?

A. Not that I ever seen it.

Q. I'll move on from that.

Did you have an opportunity to observe Mr. Bell's relationship with his mother?

A. Yes.

[245] Q. What would you say that it was like?

A. My relationship?

Q. No, his relationship with Mrs. Bell.

A. Oh, his mother?

Q. Yes.

A. Very close.

Q. How could you tell that?

A. Well, I go to see his mom and I know how she talks about him. Then of course when he calls me

and talks to me or through letters, he always asks about his mom.

Q. In his child care and in his other relationships, would you characterize Mr. Bell as lazy?

A. Care to address him as what?

Q. As lazy?

A. No.

Q. What kind of house was it that you all lived in when you lived with Mr. Bell?

A. It was a big house. It was three, four bedrooms. Myself, my husband, Tracy and Eddie and EJ and Xavian was little then, we all lived in the same house.

THE COURT: Whose house was that?

THE WITNESS: That was my house. I rented it.

BY MR. CONNELL:

[246] Q. Did you ever see anybody trooping in and out of your house to come buy drugs?

A. No, no traffic in and out of my house.

Q. What would you have done if somebody came to your house to buy drugs?

A. No.

Q. What would you have done if you saw it?

MR. WITMER: Objection; speculation.

MR. CONNELL: That's okay.

BY MR. CONNELL:

Q. Did you ever see anybody come to your house to buy drugs?

A. No. Very few people came to that house.

Q. This question is going to be worded kind of oddly, but how would you describe the impact of this whole tragedy on the three children?

MR. WITMER: Objection. Which tragedy is counsel referring to, the murder of Officer Timbrook or the incarceration of Mr. Bell?

MR. CONNELL: Your Honor, this is the precise question trial counsel was allowed to ask at trial which is why I'm phrasing it that way.

THE COURT: I'll overrule it. Go ahead.

THE WITNESS: It's been very hard for the kids. They're old enough to read. They see a lot of **[247]** things. They read stuff on TV. They don't really understand what's going on. They think they're dad's done nothing wrong.

THE COURT: Are these children living with you now?

THE WITNESS: Now, they are.

THE COURT: Tell me again when it was that Mr. Bell lived with you and had this relationship with your daughter.

THE WITNESS: It would have had to be in '94, '95, '95 probably.

THE COURT: About two years?

THE WITNESS: He lived in our house about three years. Eddie lived there about three years, him and my daughter.

BY MR. CONNELL:

Q. He was arrested in 1999, is that right?

A. Right.

Q. He lived with y'all about three years?

A. Yeah, they lived with me approximately three years.

THE COURT: From when to when did he live with you?

THE WITNESS: Let me see. They moved out of my house and moved to another house. Him and Tracy moved **[248]** out. So I'd say maybe it was only two years, '94 -- about '94 to maybe '97. They moved out and they got their own place.

BY MR. CONNELL:

Q. What would be the impact of Bell's execution on you, on Tracy and on the kids?

MR. WITMER: Objection, Your Honor, relevance.

THE COURT: I'll overrule the objection. Go ahead.

THE WITNESS: I don't know if I could handle it, but -- (witness crying) -- excuse me. I don't know. It's going to be hard because we just love him so much. We're there for him.

BY MR. CONNELL:

Q. Did you ever meet with Mr. Bell's attorney, Mark Williams?

A. Yes.

Q. Did you ever discuss what Eddie Bell was like as a person?

A. No, not really.

Q. What did you discuss?

A. It was more or less like what was going on with the case, you know, potential witnesses and things like that.

[249] THE COURT: What do you mean potential witnesses?

THE WITNESS: It was things like, they would ask us, do you know this person or ask what we have heard and just discuss things like that.

BY MR. CONNELL:

Q. When you say potential witnesses, are you talking about character type witnesses or potential witnesses about what happened at the crime?

A. Well, he had asked us to testify and everything, but we never did.

Q. When you were talking about potential witnesses, did you at that time -- were you talking about guilt and innocence or were you talking about --

A. It was the people that were supposed to have knowed something about the case.

THE COURT: Let me ask you this, ma'am. You said that the attorneys talked to you. Did both of them or just Mr. Williams?

THE WITNESS: Mr. Williams did most of it. He might have been at my house maybe twice.

THE COURT: You say you were supposed to testify but didn't. Tell me what you mean by that.

THE WITNESS: Every time we went to court -- he wanted Tracy and I in court every time, which we **[250]** were. But we were never called to testify for Eddie.

THE COURT: So did you sit in the court and listen to the proceedings?

THE WITNESS: Yes, yes.

THE COURT: Including the sentencing part? Do you remember that part?

THE WITNESS: Yes.

THE COURT: After the jury found him guilty?

THE WITNESS: Yes.

THE COURT: Did you ever say to the lawyers, I want to get up and tell the jury what a good person Eddie is and how he's good to his children so that they'll be able to know about him?

THE WITNESS: No, I don't think we ever did.

THE COURT: Why didn't you say that?

THE WITNESS: I don't know, because at that time, I wasn't thinking about things like that. I don't know.

THE COURT: You knew Eddie was on trial for his life, didn't you?

THE WITNESS: Yes.

THE COURT: Why didn't you ask --

THE WITNESS: I don't know. I figured the lawyers knew best. You know, we figured they had done what they was supposed to do and that's all we could [251] have done.

THE COURT: Did they tell you why they didn't call you as a witness?

THE WITNESS: No, sir.

THE COURT: Go ahead.

BY MR. CONNELL:

Q. Thank you.

Did Mr. Williams or Mr. Fischel, for that matter, ever talk to you, ask you about what really happened with Billy Joe Swartz?

A. Not that I can remember.

Q. Did you ever discuss with them the allegation that Mr. Bell had committed acts of domestic violence against Tracy?

A. No, I don't think so.

Q. If Mr. Williams had asked you the questions that I asked you today, how would you have answered?

A. Same way I answered them to you.

Q. You were actually issued a subpoena for trial, is that right?

A. Yes.

Q. Did you expect to testify?

A. Yes.

Q. Did Mr. Williams ever get together with you to talk about what exactly you would testify about?

[252] A. No.

Q. Was there ever a time y'all had a little meeting and here are the questions I might ask or anything like that?

A. No.

MR. CONNELL: Thank you very much.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. WITMER:

Q. Ms. Nicholson, did you have a meeting with Carmeta Albarus?

A. Yes, I did.

Q. You told Ms. Albarus that Edward Bell held legitimate jobs, didn't you?

A. Yes.

Q. And you didn't tell her that he'd been fired from most of those jobs, did you?

A. Yes, I believe I did.

Q. So if that information didn't show up in her report, that wasn't because you didn't provide it to Ms. Albarus, is it?

A. I have no idea.

Q. So you were aware that he was fired from Shockley Brothers because of unsatisfactory performance, right?

A. No. At Shockey's, I didn't know nothing about [253] that one.

Q. What about Addeco?

A. Midwestco?

Q. Well, let's talk about Midwestco. Wasn't he fired from Midwestco for refusing to obey instructions from a supervisor?

A. No, the only one I know of, Eddie walked out one night, but he could have got his job back, but refused to go back.

Q. Do you know the employer considered he had committed an immoral act on the premises and that was one of the reasons they fired him as well?

A. No.

Q. So you don't know what that immoral act might have been, do you?

A. No.

Q. Do you know the employer observed he was engaged in fighting or provoking fights with other people on the employer's premises. You don't know about that, do you?

A. No.

MR. CONNELL: I object. This witness is not an expert and testing her knowledge on collateral issues is beyond the scope.

THE COURT: What's the relevance of whether she knows about his employment history?

[254] MR. WITMER: She's here as a witness for his character.

THE COURT: I don't believe so. I mean, she's testified about his children and about he was a good father to his children and about his relationship with her daughter. I don't think she's testified to anything about his reputation or given any opinion about his reputation as to lawfulness or his employment history. If she had testified, the state prosecutor couldn't have asked her the questions you're asking her.

MR. WITMER: I'll move along, Your Honor.

THE COURT: Thank you.

BY MR. WITMER:

Q. Now, you've testified that Eddie Bell was a good father to your grandchildren.

A. Right.

Q. And those grandchildren were born in 1997, 1998 and 1999, is that correct?

A. Correct.

Q. And they were Eddie Bell's third, fourth and fifth children, is that correct?

A. Correct.

Q. Are you aware that employer records showed that during 1997, Eddie Bell earned only $3,300? In 1998, he earned $326; and in 1999, he earned --

[255] MR. CONNELL: Same objection, Your Honor.

THE COURT: I mean, the question to her is -- did Eddie bring any money into the house?

THE WITNESS: Yes. When he was working, yes.

THE COURT: But was he working in some sort of high wage job?

THE WITNESS: No.

THE COURT: What sort of money did he bring into the house?

THE WITNESS: He worked at the same place I worked at and I made more money than Eddie did. The job Eddie was doing were low paid jobs in that plant.

THE COURT: So did he contribute any money to the running of the household?

THE WITNESS: Yes, yes.

THE COURT: How much? How does that work?

THE WITNESS: I don't know but if he had the money, he'd help buy groceries, he'd pay half on the rent, telephone bill, utility bills or anything.

BY MR. WITMER:

Q. How much, ma'am, would half on the rent have been?

A. At that time, I think we were only paying like 400. He'd pay what he could, maybe not half of it, but **[256]** he paid what he could on it in order to keep some money back for hisself and the children and Tracy.

Q. And he never actually paid child support, did he?

A. No.

Q. And at the same time he was supporting your grandchildren, he was supposedly supporting two other children, one in Jamaica and another one in West Virginia. Do you know where he got the money to do all that?

A. (Indicating no).

Q. Are you familiar with slang in the area in and around Winchester as far as references to the Charleston track being a reference to drug dealing?

A. No.

Q. So you're entirely unaware of Eddie's involvement in dealing drugs?

A. No, I don't know of any.

Q. If Eddie was going to the track to bet on the horses, where would he have gotten any money to bet on the horses?

A. Well, like I say, sometimes he didn't help on the bills. Sometimes he put money back for hisself or Tracy was working. Tracy would give him money. If I had money, I loaned him money.

Q. So was he supporting your household or were you [257] loaning him money?

A. He was doing a little bit of both. If he needed money, I'd loan it to him.

Q. You've testified that aside from a couple of arguments, you never saw domestic violence between Eddie Bell and your daughter, is that correct?

A. No, I've never.

Q. So you're unaware of a number of incidents that were serious enough that there are police reports on them that show assaults on your daughter by Eddie Bell.

A. I didn't know nothing about them.

Q. During the incident, which you say you were present for, involving Bobby Joe Swartz and your daughter, when you testified about that earlier, you didn't say anything about your daughter, Tracy, being on top of the hood of the car, did you?

A. She wasn't.

Q. Would it surprise you to know that both Bobby Joe and Tracy's version of events put her on top of that car?

A. I didn't see her on there.

Q. You weren't really present during that incident, were you?

A. Yes, I was. I was standing right beside my vehicle. I watched the whole thing.

[258] Q. You're not aware of any other violent incidents involving Eddie Bell, are you?

A. No.

Q. You're not aware of any incident where he used a gun?

A. No.

Q. You're not aware of any threats by Eddie against law enforcement officers or any other people?

A. (Indicating no).

Q. You're not aware that he threatened people?

A. No, not to my knowledge. I don't know anything about it.

Q. And you're not aware that his aggressive conduct was part of the reason he was fired from jobs?

MR. CONNELL: Objection, Your Honor. We've been through this.

THE COURT: I'll allow him to ask that.

Do you know?

THE WITNESS: No, I don't know.

BY MR. WITMER:

Q. Eddie Bell, in murdering Officer Timbrook, has caused you great anguish, hasn't he, by

depriving Officer Timbrook's family and your grandchildren of a family, hasn't he?

A. I wouldn't say that.

[259] MR. WITMER: Nothing further, Your Honor.

THE COURT: Any further questions?

MR. CONNELL: I do have some, Your Honor.

REDIRECT EXAMINATION

BY MR. CONNELL:

Q. You said Mr. Bell worked in the same place as you. Where was that?

A. Midwestco.

Q. What kind of work did he do there?

A. Eddie did what they call material handling. He did odd jobs all through the plant.

Q. What sort of hours did he work?

A. Eddie worked second shift, 4 to -- I think it was 4 to 12 then.

Q. You said that Eddie didn't pay child support. Was there a need for him to pay child support while he was living in the house?

A. No.

Q. You testified on cross-examination you're unaware of any drug dealing. During the whole time you saw Eddie, did you ever see him sell drugs to anybody?

A. No.

Q. Did you ever see anything that somebody coming to the house that seemed suspicious of him selling drugs?

A. No.

[260] Q. You said that sometimes Tracy would loan Eddie money or you would loan Eddie money. Are we talking about big thousands of dollars? Are we talking about big money here?

A. No.

Q. What are we talking about here?

A. Might be a hundred dollars at times, might be $50 at times.

Q. During the time that you lived with Eddie Bell, did you see him living some sort of cash rich lifestyle, like some big drug dealer?

A. No.

Q. You testified on cross-examination that you were unaware of any other violent incidents involving Mr. Bell. Did you ever see him commit violence against any person?

A. No.

Q. Did you ever hear him threaten any person?

A. No.

Q. Did you ever hear him talk bad or threaten police officers?

A. No, not to me, he didn't.

Q. How long did he live with you?

A. I guess almost three years.

MR. CONNELL: Thank you, ma'am.

[261] THE COURT: Thank you, ma'am. You may step down.

May this witness be excused?

MR. CONNELL: Yes, please, Your Honor.

THE COURT: You may be excused, ma'am.

You may call your next witness.

MR. CONNELL: Precious Henderson.

PRECIOUS HENDERSON, CALLED AS A WITNESS BY PETITIONER,

SWORN

DIRECT EXAMINATION

BY MR. CONNELL:

Q. Ma'am, would you please pull that microphone up to your mouth? Thank you.

Would you please state your name and spell it for the Court Reporter?

A. Precious Henderson; P-r-e-c-i-o-u-s H-e-n-d-e-r-s-o-n.

Q. Where do you live?

A. 92 Lombard Lane, Bunker Hill, West Virginia.

Q. Where is Bunker Hill, in relationship to Winchester?

A. It's about 20 minutes away.

Q. Is Winchester close to the state line?

A. Yes.

Q. If you know, where is Martinsburg in relation to [262] Winchester?

A. About 15 miles.

Q. Where were you born?

A. I was born in Jamaica.

Q. When did you move to the United States?

A. 1987.

Q. Are you currently employed?

A. Yes, I am.

Q. Where do you work?

A. Southeastern Container. That's in Winchester.

Q. Do you know Rosalyn Bell?

A. Yes, I do.

Q. How did you get to know her?

A. I met her through Marjorie, her daughter.

Q. And is Marjorie Bell, Eddie Bell's sister?

A. Yes.

Q. And Rosalyn Bell, his mother?

A. Huh?

Q. Rosalyn Bell --

A. That's Eddie's mom.

Q. Did you know Mrs. Bell when Eddie Bell first came to the United States?

A. Yeah, I know her like a couple years before Eddie came here.

THE COURT: Ma'am, your voice -- you can put **[263]** that chewing gum in the cup and really speak up in the microphone because it's hard to hear you.

BY MR. CONNELL:

Q. What was your relationship with Eddie Bell?

A. We was just friends.

Q. Did you have any kind of romantic relationship?

A. No.

Q. Did you help Eddie Bell when he first came to the country? Did you help him get a job?

A. Yes, I did.

Q. What was that first job?

A. I took him to AES. That's a temporary service where you get temporary work.

Q. Is that the letters, AES?

A. Yes, it's spelled AES.

Q. What sort of work did Mr. Bell do there?

A. He did factory work. They just, you know, call him and send him wherever they got jobs.

Q. Why did he leave that job or was he fired?

A. He went to Rocco.

Q. What is Rocco?

A. It's where they kill chickens. It's like a chicken plant.

Q. To your knowledge, was he fired from AES?

A. Not to my knowledge, no.

[264] Q. Did you help him apply for the job at Rocco?

A. No, I didn't.

Q. How long did Mr. Bell work at Rocco?

A. I'm not sure.

Q. Did there come a time when you gave him information about your company, Southeastern Containers?

A. Yes, I did.

Q. Tell us what happened.

A. He came in for an interview and we hired him.

Q. What were his duties at Southeastern Containers?

A. He was a Sidel operator.

Q. I'm sorry, what operator?

A. Machine operator, Sidel.

Q. Do you know how to spell that?

A. S-i-d-e-l.

Q. What is a Sidel machine?

A. Make Coca-Cola bottles.

Q. What kind of shifts did he work while he was there?

A. It's a 12-hour shift.

Q. Did you have a chance to observe his work ethic?

A. Yes, I did.

Q. What was his work ethic like?

A. It was pretty good.

Q. How many hours a week did he work during that **[265]** time?

A. Well, it's a 12-hour shift. One week, it should be 36. The following week, it's 40 hours. But Eddie usually put a lot of overtime in.

Q. Would you characterize his attitude at Southeastern Containers as lazy?

A. No.

Q. What was Mr. Bell like -- you actually worked there at Southeastern Containers with him, is that right?

A. Yes.

Q. What was he like at work?

A. He was pretty good to get along with.

Q. Did he have a lot of money?

A. No.

Q. When he did have money, what kind of things did he do with it?

A. Pay his bills.

Q. Was there ever a time that he went out of his way to help other people?

A. Yes.

Q. What sort of things?

A. He helped me.

Q. What did he do for you?

A. Take me back and forth to work when my car was **[266]** broke down.

Q. Do you know how Mr. Bell lost that job?

A. Yes, I do.

Q. Tell us what happened.

A. He had an accident at work one day.

Q. Do you know about that accident?

A. Yes, I do.

Q. Was that an accident at which he was at fault?

A. Actually, no.

Q. Tell us what happened.

A. He was on a forklift and the next person was on a forklift, too, and they both bumped forklifts, but he told the supervisor that he had sustained back injury from that accident. So they told him he had to go out and have a drug test done.

Q. Did he pass that drug test?

A. No, he didn't.

Q. What happened after that?

A. He was fired.

Q. What was your position at that time?

A. I was a Sidel operator, too.

Q. How long had Mr. Bell worked at Southeastern Containers?

A. He started, might have been June or July in 1995, and I think it was '97 or '98, I'm not exact on the date **[267]** when he lost his job.

Q. Would you say he worked there for more than a year?

A. Yes, he did.

Q. Would you say he worked there for more than two years?

A. I think he did.

Q. How long did you live in Jamaica?

A. I lived there -- I was 19.

Q. While you were in Jamaica, was there ever an occasion when you heard gun fire?

A. A lot.

Q. Why was that a lot?

A. When I go to Kingston to visit my aunt, they live like in the ghetto and there was gunshot every day almost.

Q. What was the common reaction of people when they heard gunshots?

A. You got to stay in. If you're on the street, you got to make sure you get some place where you can be covered.

Q. Did you ever see Mr. Bell with a gun?

A. Never.

Q. Did you ever see him violent or fighting with anyone?

[268] A. No.

Q. Did you ever see him violent toward any member of his family?

A. Not to my knowledge, no.

Q. Did you ever see him sell drugs?

A. No.

Q. While he was at work, did you ever see him sell drugs?

A. No.

Q. Did any attorney for Mr. Bell at the time of his trial ever contact you or interview you?

A. No.

Q. If they had contacted you, what would you have told them?

A. Same thing I'm telling you right now.

MR. CONNELL: Thank you. If you'd answer any questions the Attorney General has.

CROSS-EXAMINATION

BY MS. BALDWIN:

Q. Ms. Henderson, are you aware that the Southeastern Container Company, that their records show that Eddie Bell was not just fired because he flunked the drug screen test, but it was also because he actually falsified the drug screen test? Were you aware of that?

[269] A. No, they don't explain to you what happened.

Q. You described what it's like in Kingston, Jamaica, with gun fire, is that correct?

A. Yes.

Q. Do you know Bell's hometown of Drapers?

A. No, I don't.

Q. You're not aware of it?

Thank you. That's all the questions I have.

THE COURT: Thank you, ma'am. You may step down.

You may call your next witness.

MR. CONNELL: Barbara Williams.

Your Honor, I don't know the Court's policy is for when the end of the Court's day is, but we're coming up on the end of our case.

THE COURT: We'll move along then and try to finish it up.

MS. BALDWIN: Along those lines, Your Honor, is the Court inclined to continue going? If not, I will tell my witnesses to go on for the day. If you're going to continue going --

THE COURT: If we're going to -- it's ten of five now. If we're going to finish up now -- do you just this witness?

MR. CONNELL: I have two witnesses.

[270] THE COURT: I think we ought to just finish the petitioner's case and take your evidence in the morning.

BARBARA WILLIAMS, CALLED AS A WITNESS BY PETITIONER,

SWORN

DIRECT EXAMINATION

BY MR. CONNELL:

Q. Ma'am, pull that microphone up to you. Would you please state your full name and spell your name for the Court Reporter.

A. Barbara Williams, W-i-l-l-i-a-m-s.

Q. How old are you, Ms. Williams?

A. I am 39 years of age.

Q. Where do you live?

A. I live in Port Antonio, Jamaica.

Q. How are you employed?

A. I'm a teacher, by profession.

Q. How long have you been a teacher?

A. 16 years.

Q. When did you first meet Eddie Bell?

A. In the summer of 1986.

Q. How did you meet him?

A. I met him through my sister, Carol.

Q. Did Mr. Bell and Carol live together?

A. Yes, they lived together.

[271] Q. Was that a romantic relationship of some kind?

A. No, it was a social relationship.

Q. When did you and Mr. Bell start dating?

A. It was in '87, sometime in '87.

Q. What was he like during that time?

A. Very loving, very decent, hardworking.

Q. Let's take those in order. How did he show that he was very loving?

A. Would you repeat that for me, please?

Q. How did you know he was very loving? What did he do?

A. Because of the relationship that we had. When I go to work and he was not working because the work that he had was a seasonal job and when I went to work, he'd wash my clothes. Even things I couldn't say in here. He'd clean my shoes. He'd cook my food. He'd clean the place. I didn't have anything to do at all. He was my house wife.

Q. In that time, in what he did in the housekeeping, would you characterize him as lazy?

A. Even to my own shoes, he would clean even my shoes. That's how good he was.

Q. You said he was hard working. You said he had a seasonal job.

A. Yes.

[272] Q. What sort of seasonal work was that?

A. Well, he did both. He did Mason work where he made banister rails at this construction site, but when there was no construction going on, then he would resort to barbering, which he did mostly in his spare time. But his friends, mostly people were his

friends would come and get their hair trimmed and they would pay him as well.

Q. You said that he would cook and clean while you were away. During that time in 1987 or shortly therefore, what were you doing professionally?

A. I was going to college. I was attending college.

Q. Now, during that time -- did you move in with Mr. Bell?

A. Go again.

Q. Did you all live together?

A. Yes, we lived together.

Q. From what period of time?

A. We lived together my entire years at college. I did four years of college, from 1987 until 1991.

Q. During that time, was Mr. Bell ever violent towards you?

A. No, no, never.

Q. Did you ever see him be violent toward any other person?

[273] A. I can't recall that, no.

Q. Did you ever see him carry a gun or another weapon?

A. Oh, no.

Q. Did you ever see him get into any fights?

A. No.

Q. During that time, did he ever express any animosity toward police officers?

A. Of course not because as a matter of fact, to the contrary, he had a lot of police friends, even soldiers.

Q. Was he involved in any activities that the police sponsored?

A. No.

Q. Do you know what a police youth club is?

A. Yes. It's a social group that the police would form in each community where the young people would get together and they'd get to know the work of the police better. They'd do activities in the community, clean the churches, visit the sick, render help to the old and shut-ins and so on. It was a range of activities.

Q. Was Mr. Bell ever involved in the police youth clubs?

A. Yes, yes, that was before -- he was involved before we started living together.

Q. Do you know who Steveroy Campbell is?

[274] A. Yes, I do.

Q. Who's that?

A. He's a police officer from the community where Eddie born and grew.

Q. And what was the relationship between Mr. Campbell and Mr. Bell?

A. Excellent.

Q. And do you know who Angellita Hamilton is?

A. Yes, I do.

Q. Who was that?

A. She's a police officer as well from the same community.

Q. What was the relationship between Mr. Bell and Ms. Hamilton?

A. It's good.

Q. Overall at that period, 1987, 1991, how would you characterize that time with Mr. Bell?

A. I got the best of him. I got the best of him.

Q. Now, he left for the United States in December of 1992, is that right?

A. Yes.

Q. Do you know why he left at that particular time?

A. Yes. At that time when he left, I was pregnant. I went into premature labor. His plane tickets and all the paperwork were done. His mother then had been filing **[275]** for not just him but for his other siblings for a long time and she had several setbacks. When the papers finally came through and they were supposed to leave on that day, she insisted on that day he should come because she was very happy to get him away from the community because she was working on this for a very long time.

Q. Before Mr. Bell left, did he look into what your medical care would be?

A. Go again, please?

Q. Before Mr. Bell left, what medical care did you receive?

A. Well, I was in the hospital.

Q. And were there any arrangements for your continuing care?

A. My condition was so bad that they were making arrangements to take me into Kingston at a bigger facility. So he knew all of that, too. He knew all of that.

Q. Mr. Bell, did he return?

A. Yes, he came back the following year.

Q. Did you get married then?

A. Yes, we got married.

Q. Were there plans for you to come to the United States?

[276] A. Sure.

Q. What happened with those plans?

A. Well, the plans were derailed because the lawyer was filing the papers died. Eddie lost his work and communication between he and I were a little bit staggering at the time.

Q. After the communication broke down and the marriage broke down, what happened to your daughter, Kamille?

A. Devastated. I can tell you that. She was devastated.

Q. Did Mr. Bell continue to maintain a relationship with Kamille?

A. Yes. She really -- she got a lot of support. He, even though he wasn't communicating with me directly, he would call her. He would write letters because where we live in Port Antonio at the time, we didn't have Western Union outlets all that much. So he had to send letters through the post and we'd get letters and we'd get monies and all of that, yes. Even when he saw anybody coming down to Jamaica from here that he knew, he would send things for us, even though he and I were not intimately involved any longer.

Q. What kind of father was Mr. Bell to Kamille?

A. A very good father.

[277] Q. Does he still write to her?

A. Yes, yes, he does, yes, he does very regularly.

Q. Does Kamille ever come to Virginia or has she ever come to Virginia to visit him?

A. Yes, almost every year from she was eight years old.

Q. Does she still come now?

A. Yes, she does. She was here even up to last summer.

Q. What has been the impact of this whole tragedy on Kamille?

A. It's terrible. It has affected her school work quite a lot.

Q. I'm sorry to ask you this question, but if Mr. Bell were executed, what would the impact be on Kamille?

MS. BALDWIN: I'm going to object to that, Your Honor. That wasn't asked at trial and would not have been allowed.

THE COURT: I'll overrule the objection. Go ahead.

THE WITNESS: Maybe she'd end up in a psychiatric ward at the psychiatric hospital. I strongly believe that. From the responses that I got from her teachers, I have to visit her school and even though this is quite personal for Kamille and myself, I [278] have to divulge information why she not doing as well as she ought to because, if the judge may allow me, she's almost like a gifted child because she doesn't study all that much, but she gets very excellent grades and the teachers say something is wrong, why she can't be at the top of her class because she has the ability to do so.

BY MR. CONNELL:

Q. Why do you know that it's this tragedy that --

A. Because she talks about it. Even sometimes when we sit and watch television as a family, she sees some of these cases, what we are conducting here this afternoon, and she say to me, mommy, see that man in those clothes, that's what my father is into.

Q. Were you surprised when you heard of the charges against Mr. Bell?

A. I was really, really taken aback, yes.

Q. Did you consider it to be in character?

A. No.

Q. What was your address in the year 2000?

A. Same place where I'm living, Port Antonio, Jamaica.

Q. Did you have a phone?

A. Yes, I do.

Q. To dial Jamaica from the United States -- have **[279]** you ever called Jamaica from the United States?

A. Yes.

Q. To call Jamaica from the United States, do you have to go through any complicated country codes?

A. No 876, dial the party's number, and that's it.

Q. Jamaica has a regular area code?

A. Yes, 876. It hasn't changed.

Q. Would you consider yourself difficult to find?

A. No, I'm not. I'm a teacher by profession. The place where I've been teaching for the past 16 years, that's where I'm at.

Q. Did anyone from the defense team ever call you?

A. Never, never.

Q. Would you have talked to them if they had?

A. Yes, surely.

Q. What would you have told them?

A. I would tell them everything I just said here.

Q. What else would you have done for them?

A. Would you go again?

Q. Sure. Is there anything else that you would have done to help them other than simply talking to them?

A. Well, I would show them evidences that he's a good father, all the letters, all the monies I've collected from him, even though he's incarcerated, yes, all the lovely cards he made. I don't know how he makes **[280]** them. I would have.

THE COURT: Ms. Williams, did you know that Mr. Bell was being tried? Did you know about the case when he was being tried?

THE WITNESS: Just recently.

THE COURT: So at the time that he was tried for murder and convicted, you did not know what was happening.

THE WITNESS: I heard about bits and pieces of it, but didn't understand exactly what was happening because nobody really contacted me. Whatever information I got, I would get it from people, from his relatives and so on because nobody came and said anything to me.

BY MR. CONNELL:

Q. Are there other people who know Mr. Bell who live in Drapers or Portland District?

A. Yes.

Q. In the year 2000 or 2001, could you have come to Virginia to testify?

A. Sure, because I have a Visa from a long time.

Q. Do you have a passport?

A. Yes, I do.

Q. Do you have a Visa to come to the United States?

A. Yes, yes.

[281] Q. For example, to come here, did you have to get a new Visa to come here?

A. No.

MR. CONNELL: Answer any questions the Attorney General might have.

CROSS-EXAMINATION

BY MS. BALDWIN:

Q. Ms. Williams, you do know that Edward Bell has been sentenced to death because he murdered a police officer, don't you? You do know that.

A. Yes, ma'am.

Q. Now, how old was Kamille when he murdered the police officer?

A. I'm not sure.

Q. When was she born?

A. Pardon me?

Q. When was she born?

A. She was born in 1992.

Q. '92?

A. Yeah.

Q. So she was about six or seven years old?

A. I can't tell you because I didn't know that he murdered a police officer because as I said, nobody contacted me. I heard bits and pieces of it. When you hear from people, you can't really repeat because you're **[282]** not sure.

Q. But you know that now.

A. Yes, I know that now.

Q. And Kamille knows that now.

A. Yes, she knows that now.

Q. That's got to be terrible for her at school knowing that her father murdered a police officer. That must be a terrible thing for her.

A. Yes, it is.

Q. I can imagine. Now, during this period of time that you described where you lived with Bell before you were married when you were in college and you said that he was a good husband and he cooked and cleaned --

A. Not husband. It was boyfriend, living together.

Q. He was a good man.

A. Yes.

Q. And he helped you cook and clean. Were you aware during that period of time, were you aware that he had been convicted in Jamaica of an assault charge?

A. No.

Q. You weren't aware of that?

A. No, no.

Q. You were never aware of any assault conviction in Jamaica.

A. No.

[283] Q. Now, when Edward Bell, when his parents arranged for him to come and he came to the United States and then he came back and married you -- isn't that correct?

A. Yes.

Q. I believe you testified that he was going to make arrangements or someone was going to try to make arrangements for you to immigrate to the states; isn't that correct?

A. Yes.

Q. That didn't work out and you said one of the reasons was because communication broke down with Edward Bell. Part of the reason that your communications broke down, didn't it, was because you found out he had taken up with another woman here in the United States.

A. I wasn't aware of that. I wasn't aware of that.

Q. When? When did you become aware of that?

A. Well, I was aware of that when Kamille came here to visit and she came back and she took pictures of her sisters and brothers. That's when I really knew.

Q. Did you speak to Ms. Albarus in this case?

A. Go again, please?

Q. Did you speak to Ms. Carmeta Albarus in this case?

A. Yes.

Q. Didn't you tell her that part of the reason why **[284]** you didn't immigrate to the country was because you had found out that he had taken up with another woman here?

A. No.

Q. You did eventually learn that he had taken up with at least one other woman here, isn't that right?

A. Well, I explained to you was that I found out when Kamille visited and I told you, she started visiting when she was quite young, between age eight and nine.

Q. So are you saying he hid that information from you?

A. I wouldn't say it was being hid because he knew Kamille would eventually visit because he knew Kamille had a Visa.

Q. He just didn't tell you he had another woman here in the United States.

A. Right, he just didn't say.

Q. He didn't tell you he had a child with that other woman.

A. No.

Q. He didn't tell you that he then had a relationship with even a different woman and had three other children with that woman? Are you saying Edward Bell didn't tell you about any of that?

A. No.

[285] Q. But you did eventually divorce him. Why did you divorce him?

A. Well, as I told you, my daughter visited and she brought the pictures home. I realized there was nothing else in the relationship. But even prior to that, I told you because of the communication problem, then we realized the relationship being so far in Jamaica and he was right here in Virginia, then if we were not communicating, then it didn't make a lot of sense.

Q. Once you finally knew about these other relationships and other family, that was when you decided to divorce him.

A. I told you, it was when my daughter came here and she took back the pictures. But I didn't divorce him shortly after that. It was long after that. It wasn't done then. It was long after.

Q. Then you remarried.

A. Yes, and I just recently married in 2002.

THE COURT: Ms. Williams, how did you feel when Mr. Bell left you to go to the United States

when you were pregnant and having problems and he left?

THE WITNESS: Judge, I'm speaking the truth. I was unconscious. I was that ill. But I knew before that that he was going and I was happy because being having him go and I knew he was going to help **[286]** financially and then I'd be coming here soon. I was happy. I was happy. I was happy. His leaving and my being sick had nothing to do with it. I was just having serious medical problems.

THE COURT: Go ahead.

MS. BALDWIN: No further questions.

THE COURT: Anything further?

MR. CONNELL: No. Thank you.

THE COURT: Thank you, ma'am. You may step down.

I take it this witness may be excused.

You may be excused ma'am.

You may call your next witness.

MR. CONNELL: Carol Anderson.

CAROL ANDERSON, CALLED AS A WITNESS BY PETITIONER,

AFFIRMED

DIRECT EXAMINATION

BY MR. CONNELL:

Q. Ma'am, would you please pull that microphone to you so we can hear? Would you please state your full name and spell your last name for the Court Reporter?

A. Carol Baugh Anderson; B-a-u-g-h, A-n-de-r-s-o-n.

Q. How old are you, Ms. Baugh-Anderson?

A. 42.

Q. Where do you live?

[287] A. Drapers, Portland, Jamaica.

Q. How are you employed?

A. At the bank.

Q. How long have you held that position?

A. Pardon me?

Q. How long have you worked at a bank?

A. I work at the bank for 12 years at First Caribbean. It was then CIBC Jamaica Limited, and I'm now at Jamaica National Bank Society.

Q. How did you meet Eddie Bell?

A. I met him in late 1985 when I change my job and move on to work at CIBC, now First Caribbean. I met him through a cousin that is now my husband.

Q. What did people call him at that time?

A. They call him Slow or Natty Slow.

Q. Did you move to a different neighborhood around that time, in 1985?

A. Pardon me?

Q. In 1985, did you move to a different neighborhood?

A. Yeah, I move from Nunsuch where my family live, and I move into Drapers.

Q. Could you describe what the neighborhood in Drapers is like?

A. It's a quiet neighborhood. Warm, friendly people **[288]** lives there.

Q. Was it sometimes deserted?

A. Please repeat.

Q. How did you get to work during that time?

A. Well, at that time, we usually take taxies because the transportation wasn't there at the time like now. We take the taxies, and hardly any taxies on the road. Normally, we take a taxi from work and sometimes it used to be late, like ten in the night because it's not like we have computers and all, we had to work manually. Our job was that late in the night, 10:00, 11:00.

Q. Did you make a request to Mr. Bell?

A. Yes.

Q. What did you ask him?

A. Because I was alone, living in that house alone, I had asked him if he could come stay with me because I don't think I want to stay alone. I was a bit lonely there, so I asked him to stay with me then.

Q. Why did you choose him out of other people to come and stay with you?

A. As I said, when I moved into the community into Drapers, I met him through my husband. We had a relationship then at the time. We used to go like to the beach and all of that. Seeing and knowing him and **[289]** having a little relationship at the time with him, then I ask him if he could stay with me.

Q. Did you have any kind of romantic relationship with Mr. Bell?

A. No, not at all.

Q. What was the living arrangement like?

A. There were two bedrooms. I had my own bedroom and he had his own bedroom.

Q. Did he ever make any kind of advances on you?

A. Not at all. Perfect young man at the time.

Q. What was he like when he lived there?

A. Pardon me?

Q. What was he like when you were living with him.

A. Okay, I can tell you, he was more than a brother. He used to cook for me. He used to clean. When I come home, there is always dinner ready for me. House is always clean. I tell you, I could rely on him for that, uh-huh.

Q. Did he ever come meet you at the road?

A. Well, as I said, not at work, but when I come off of taxies, I have to walk up this hill, which is about a mile-and-a-half or so up. So he normally comes, wait for me at the bus shed and we walked up together most nights.

Q. Are you saying he would walk a mile-and-a-half **[290]** just to walk you home?

A. Yes, he comes and meet me.

Q. Did you ever leave him in the house alone?

A. Yes, even when I visited the United States on vacation, I left him there alone.

Q. Did he work during that time?

A. Yes.

Q. What sort of work did he do?

A. I can recall he does barbering and he does it at home. Plus when they have buildings going up, he was always on the site as a laborer. He was very good at making these things called banister rails, decorative things.

Q. Did you introduce him to your sister?

A. Okay, let me tell you what happened. I can remember when my friend, he's a cousin now, that's my husband now, we drove out one evening and he

came by. He -- she was there with me. So he came over to me and asked me who's that, and I told him it's my sister. He said, guess what, I like her. From then, they started to talk and so on.

Q. What is your sister's name?

A. She's Barbara.

Q. Is she the person who just testified?

A. Yes.

[291] Q. During that time, did you ever know Mr. Bell to be violent?

A. No, not at all.

Q. Did you ever know him to carry a gun or any weapon?

A. No, no, that never happened.

Q. Did you ever know him to get in any fights?

A. No.

Q. Did he ever express any animosity toward any police officers?

A. No, not at all.

Q. When you heard of the charges against Mr. Bell of capital murder, what was your reaction?

A. I was saying oh, no, this couldn't be Slow because that's how I call him, this couldn't be Slow. The person that I know could not be Slow.

Q. Why did you have that reaction?

A. Because the only type of person, the relationship that we have and we're close at the home. I never see him with anything, you know, no, never.

Q. Where did you live in the year 2000?

A. I live in Drapers.

Q. Did you have a phone?

A. Yes.

Q. Would you consider yourself difficult to find?

[292] A. No, not at all.

Q. Did anyone from the defense team ever call you?

A. No.

Q. If they had called you, would you have talked with them?

A. Sure.

Q. What would you have told them?

A. Just exactly what I said here now and I would even take them out into the community, if need be, have them meet other people because I'm sure they would hear good things about Eddie, about Slow.

Q. What do you mean, take them out into the community?

A. Take them to other persons in the community like to teachers there, the justice of the peace, other people I could take to tell them who he really is.

Q. If you had been asked to, would you have come to the court in 2000 or 2001?

A. Yes, I would have.

Q. Do you have a passport?

A. Yes, I do.

Q. Did you have a passport in 2000, 2001?

A. Yes.

Q. Do you have a Visa to come to the United States?

A. Sure.

[293] Q. Did you have a Visa to come to the United States in 2000, 2001?

A. Did I travel there?

Q. Yes, did you have a Visa at that time?

A. Yes, I had a Visa from way back in 1989, '90, thereabouts.

Q. If you had been told it was important, could you have even paid for yourself to come to Virginia?

A. Yes, I would.

MR. CONNELL: Thank you very much. You may answer any questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. HARRIS:

Q. Good afternoon, Ms. Anderson. Ms. Anderson, you said in 1985, you moved from Nunsuch to Drapers?

A. Yes.

Q. And you described Drapers as a warm and friendly place?

A. Yes.

Q. You said, but regardless, you asked Eddie Bell to come and live with you because you felt uneasy?

A. Not really. It's just that I needed company. Normally, you don't want to stay alone. That's why I really asked him to come and stay with me.

[294] Q. Did you hear gunfire in that area?

A. No, not at all, quiet neighborhood. Not a lot of visitors come.

Q. How long did Eddie Bell stay with you?

A. I would say about a year-and-a-half. I can't recall, but around about a year-and-a-half or so.

Q. When he left your house, did he live with your sister?

A. Pardon me?

Q. When he left your house at that time, did he then go and live with your sister, Barbara Williams?

A. Yes, they lived together for a while.

Q. Then you were aware at some point, she was pregnant?

A. Yes.

Q. And --

A. I know all about that.

Q. Then you were aware at some point, he left to go to the United States?

A. Yes.

Q. Apparently, she was very ill in the hospital?

A. Uh-huh.

Q. You were aware of that. You said when you were living together, he cooked and cleaned for you?

A. Yes.

[295] Q. And had supper for you when you got home?

A. Pardon me?

Q. He had supper for you when you got home?

A. Yes. Normally cooks and clean and everything, uh-huh.

Q. He sort of kept house and you went to work?

A. Right.

Q. But it was not a romantic relationship?

A. No, not at all.

Q. Did he pay you rent?

A. No.

Q. You say that you never knew him to be violent?

A. No, not at all.

Q. But you know now that he murdered a police officer. You're aware of that now?

A. No, I'm not aware of that.

Q. You weren't aware of that?

A. Well, that's why I'm here now because I was told I have to come to give witness for him because of what happened.

Q. Were you aware that he also dealt drugs?

A. No, I don't know anything about that. Never heard anything about that.

MS. HARRIS: That's all, Judge.

THE COURT: Anything further?

[296] MR. CONNELL: No, thanks.

THE COURT: Thank you, ma'am. You may step down.

And this witness may be excused, I assume.

MR. CONNELL: Yes.

THE COURT: You may be excused.

Petitioner rests?

MR. CONNELL: Yes, sir.

THE COURT: We'll adjourn court at this time for the day and reconvene at nine in the morning and we'll hear the respondent's evidence.

If there's nothing further then, we'll adjourn court for the day.

(Proceedings adjourned at 5:25 p.m.)

* * *

[Petitioner's Hearing Exhibit 1]

SUMMARY REPORT OF ANTICIPATED TESTIMONY

My name is Craig S. Cooley. I have been a licensed attorney in the Commonwealth of Virginia since 1977. I have specialized in the defense of criminal cases for all 29 years of my practice.

All of my practice has been in the courts of the Commonwealth of Virginia and the United States District Courts for the Eastern and Western Districts of Virginia. In my career I have represented sixty-one individuals charged with capital murder. Approximately twenty-five to thirty of those have gone to full trial.

I serve as an adjunct professor at the University of Richmond's T.C. Williams School of Law where I teach a course in capital murder litigation. I have spoken at numerous seminars on capital litigation and as guest lecturer at the law schools at Yale, Georgetown, American, Houston and Suffolk Universities on subjects of capital representation. I have spoken at many of the annual Capital Defense Workshops of the Virginia Bar Association which are required for certification for court appointment in capital cases. I have attached a more detailed resume as Exhibit A.

During my career, particularly over the past 15 years, I have been frequently asked to serve as an expert in the area of attorney competence/effectiveness in capital representation. I have declined to serve in approximately 90% of those requests because as a trial counsel I am particularly sensitive to "second guessing" by attorneys who

weren't in the front line of the case. I have agreed to serve only when I perceive the omissions to be beyond the pale and feel my ethical duty requires me to participate. When I do agree to serve, I do so only on a pro bono basis.

My capital trial experience, teaching experiences, participation in capital seminars, and my observation and review of other capital trials have given me a general awareness of the evolving accepted standard of professional conduct in preparing a mitigation presentation for a capital trial.

I have been asked to offer my opinion as to what would have been the reasonable expectation of a Virginia attorney in investigating and preparing a mitigation presentation in the years 2000-2001. I have been asked to address the handling of such mitigation investigation when the defendant's background was from outside the United States.

A proper mitigation investigation at a minimum includes 1) collection of data 2) interviewing witnesses, and 3) securing psychological/psychiatric evaluations and explanations.

DATA COLLECTION

At a minimum counsel (on their own or through a mitigation expert) should secure the following documents if applicable to the specific defendant:

1. School records-grades/discipline/IQ/Psych

2. Medical records/reports
3. Psychological/psychiatric evaluations
4. Prison records-including medical/pysch
5. Court (particularly Juvenile court) records such as social histories
6. Prior criminal record
7. Records of substance abuse and treatment
8. Military records
9. Probation/parole records
10. Current jail records

Beyond these basics there are a multitude of potential documents. Checklists of suggested "records to obtain" have been part of the capital defense workshop training since it was initiated in 1993.

These include divorce records of the defendant and/or his/her parents, birth records, Department of Youth Services records, records of social service agencies, police response calls and incident reports to family residences, etc..

INTERVIEWING POTENTIAL WITNESSES

Counsel should interview at a minimum the following persons. The interviews will invariably lead to other persons with background information. The goal is to gather maximum information while identifying specific witnesses who can best present the information in support of the mitigation theme.

1. All known relatives, but particularly parents, siblings, spouses, children.

2. All identifiable close associates, friends, boyfriend, girlfriend, other parent of their child(ren).
3. Teachers, counselors, administrators, mentors.
4. Employers, co-workers, military buddies.

Out of country backgrounds have always created more problems for mitigation investigation, especially for court appointed counsel. There is no subpoena power for documents or witnesses. Travel costs for the investigator/attorney and incoming witnesses are problematic. That was particularly true prior to Wiggins v. Smith, 539 U.S. 510 (2003). However, that certainly did not mean that in 2000-2001 out-of-U.S. mitigation investigation couldn't be successfully pursued.

The defendant and family members can often supply contact information (telephone numbers, addresses) for family members, friends, educators, caretakers, etc. in the foreign country. Sometimes they are traveling back to their home country and can assist in the contact.

The U.S. Embassy or Consulate can be of assistance, as well as the embassy of the country in question. Many other nations proscribe capital punishment, and their embassies are anxious to help.

Funding for counsel or investigator to travel to the foreign country has been only rarely granted in Virginia. That was certainly the case prior to Wiggins. Fair minded judges (and Virginia has many) will and would fund necessary expenditures but only if that necessity is/was clearly demonstrated and presented. It would have been

reasonable and within the accepted standard to seek funding in 2000-2001.

Travel expenses were granted for counsel/investigators going to other U.S. states for mitigation investigation. Those costs in many instances would not have been exceeded by the costs of an out-of-country investigation. This, of course, is dependent on what country would need to be visited.

PSYCHOLOGICAL/PSYCHIATRIC MITIGATION

Virginia statutes provide potential evaluations for competency, retardation, and sanity at the time of the offense. In addition Virginia Code Section 19.2-264.3:1 requires appointment of a mental health expert to assist in determining:

> (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

All the documents, data, and interview notes should be supplied to the 19.2-264.3:1 expert. Counsel should clearly define the role of each mental health expert as to evaluating retardation, competency, sanity, or penalty mitigation.

[It should be noted that the Virginia statute relating to expert assistance of the issue of retardation (Virginia Code Section 19.2-264.3:1.2) was not in existence in 2000-2001.]

Counsel's responsibility would be to provide the mental health experts with all information developed in the mitigation investigation, and work with the expert to develop the presentation, if any, of the mental health mitigation evidence.

This, in summary form, represents in my opinion the reasonable standard of professional conduct by a Virginia attorney representing a capital defendant in the years 2000-2001.

Respectfully submitted,

/s/ Craig S. Cooley
Craig S. Cooley, Esquire
3000 Idlewood Avenue
P.O. Box 7268
Richmond, VA 23221
804-358-2328
804-358-3947 (Fax)
Cooleycs@msn.com
VSB No: 16593

[CURRICULUM VITAE OMITTED]

* * *

[Petitioner's Hearing Exhibit 4]

Institute of Law, Psychiatry & Public Policy
University of Virginia

P.O. Box 800660 · Blue Ridge Hospital ·
Charlottesville, Virginia 22908-0660

December 14, 2000

VIA TELEFAX TO: 540-349-8579

Mark B. Williams, Esquire
7 Wall Street
Warrenton, VA 20186

RE: Commonwealth of Virginia v. Edward Nathaniel Bell

Dear Mr. Williams:

Attached are the documents we found in Eddie's jail file regarding direct threats made on Eddie's life, at least one by a police officer. Also included is a copy of my notes of a meeting I had with the Captain of Security, P. J. Krieger, and one of the transport officers about Eddie's behavior during the time at the jail.

Unfortunately, I have terrible news. I returned to the office after our meeting at the law school today and attempted to telephone Nellie Walker, Eddie's older sister in Jamaica, the person who we wanted to come to the United States to testify. I found that she

died on Monday of a brain hemorrhage. I talked with Marjorie and several of the family members are flying to Jamaica to plan her funeral. Marjorie is leaving for Jamaica on Friday, December 15th and will return on December 22nd.

I also asked Marjorie about any witnesses she might be able to produce for you as witnesses favorable to Eddie. She indicated that she and Tracy had prepared such a list with telephone numbers for the first lawyer in this case, Mr. Boyd. Did you receive any records from Mr. Boyd? If so you may want to check and see if you can find such a list. In any event, Marjorie is willing to work on one so please to check with her. She indicated she would try to work on a list before she leaves and when she returns from Jamaica.

While I was speaking with Marjorie, she indicated that there are "cops" in Jamaica questioning family members about Eddie. So far she has learned that they have questioned two cousins, Althea and Jacqueline, daughters of her Mother's sister JoAnn. Marjorie was confused and did not know who had sent them. I indicated that I had no knowledge of you and/or Mr. Fischel sending investigators to Jamaica. Marjorie indicated that she was telling the family not to speak with the cops, whoever they are. It is my understanding that the Courts regularly appoint investigators to work with defense attorneys in capital cases. Are there any investigators appointed to this case? Could these investigators possibly help you in locating witnesses? Please let Marjorie know if there investigators and who they are so she can let the family know.

Please let me know if you have any questions regarding these matters.

Sincerely,

/s/ Connie J.A. Beck
Connie J. A. Beck, Ph.D
Postdoctoral Fellow

encl.

[ATTACHMENTS OMITTED]

* * *

[Petitioner's Hearing Exhibit 5]

Denise Y. Lunsford, Esquire

408 East Market Street,
Suite 208B,
Charlottesville, Virginia 22902

Tel. (804) 977-3668
Fax (804) 293-0819

February 7, 2000

J. Lloyd Snook, III, Esq.
P.O. Box 2486
Charlottesville, Virginia 22902
BY FAX 804-295-0698

RE: **Commonwealth v. Edward Nathaniel Bell**

Dear Lloyd:

Pursuant to your request to Marie Deans at the request of the Court, this letter contains the plan which The Virginia Mitigation Project, Inc. intends to follow in providing services for Edward Bell. This plan contemplates a trial in approximately May, 2000. If possible, however, the trial date should be extended in order to allow the Project to properly prepare a case in mitigation. The plan is subject to modification as we become more familiar with the case and as trial approaches. It may also be modified pursuant to your instructions, in the event that you believe that the Judge is unlikely to grant additional time to the Project. The time estimates given depend on travel time necessary to talk with the client and witnesses and may increase if excessive travel is necessary.

Initially, we must review any information you have received in this case to date. This includes the charging documents; reports of witness statements and/or co defendant interviews; police reports; certificates of analysis; and any school, medical and other documents related specifically to Mr. Bell which you have obtained. After review of these documents, we will interview Mr. Bell at length regarding his life history and the specifics of this alleged crime. This interview must take place at a time when Mr. Bell can spend a good deal of time together alone and without interruption with either Marie or me and may require more than one interview.

After review of the documents collected thus far and talking with Mr. Bell, we will determine what additional documents must be requested and reviewed. For example, it is very important that we collect and review all school and medical records related to Mr. Bell. I anticipate that this portion of our work will take approximately 25 - 35 hours depending on the number of documents received and number of interviews necessary.

While we are working on the above, we will also be interviewing witnesses who are familiar with Mr. Bell in order to obtain a more complete history. These witnesses may include family, friends, educators, health care providers and co workers. It is especially difficult to know how much time will be required here, but an estimate of 45 - 70 hours is not out of line.

After interviewing Mr. Bell, collecting documents, and interviewing witnesses, the Project will assist you in determining whether it is necessary to have

him submit to expert interviews or testing and, if so, the kind and extent of testing necessary. If such testing is necessary, we will assist in obtaining the proper expert assistance. We will work with this expert as he prepares to conduct interviews and testing and as he prepares his results. Along with you and the expert, we will determine if it is in Mr. Bell's best interest to have the expert testify at trial. This will take approximately 15 to 25 hours.

Finally, we will assist you in determining how best to present the case in mitigation at Mr. Bell's trial. In doing so, we will assist you in selecting witnesses and preparation of those witnesses. We will also assist you in integrating the case in mitigation into all aspects of the trial, from jury selection to final arguments, and preparation of trial strategy. This portion of our work will require approximately 20 - 30 hours.

Of course, during this entire process, we will keep you up to date on our progress and the work that we are performing. We will be available to you as necessary for meetings and phone conferences on the progress of our work and how best to integrate our work into your case as a whole. Both Marie and I fully believe that we are one part of the whole defense team and are ready to assist in any way possible with the preparation of Mr. Bell's case.

I hope that this plan assists you in understanding how we expect to assist you in this case. Please contact me in order to discuss any aspect of this plan about which you have concerns.

Sincerely,

/s/ Denise Y. Lunsford
Denise Y. Lunsford

cc: Marie Dean

[Petitioner's Hearing Exhibit 6]

COMMONWEALTH OF VIRGINIA
[seal and letterhead omitted]
TWENTY-SIXTH JUDICIAL CIRCUIT

June 7, 2000

Marie Deans
The Virginia Mitigation Project, Inc.
P.O. Box 5467
Charlottesville, VA 22905

RE: Edward Nathaniel Bell

Dear Ms. Deans:

This is in response to your letter of June 1, 2000. You are correct.

Mr. Snook has withdrawn as counsel for the defendant in this case, and Jud Fischel has assumed the role of lead counsel. On his motion, your services in this case were terminated. He intends to develop mitigation evidence via other means.

Sincerely,
/s/ Dennis L. Hupp
Dennis L. Hupp

CC: Jud Fischel, Esquire
Mark Williams, Esquire
Lloyd Snook, Esquire
Paul Thompson, Esquire
Court File

DLH/gs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,	Civil Action No. 7:04cv00752
Petitioner,	
vs.	Harrisonburg, Virginia
WILLIAM PAGE TRUE,	July 6, 2006
Respondent.	

TRANSCRIPT OF OPENING
MOTIONS AND OBJECTIONS
BEFORE THE HONORABLE JAMES P. JONES,
UNITED STATES CHIEF DISTRICT JUDGE

* * *

[2] THE COURT: Good morning, ladies and gentlemen. We're ready to proceed again.

Be glad to hear evidence from the respondent.

MS. BALDWIN: Thank you.

Your Honor, before we begin, I have just a couple things I want to make clear for the record and that is that I renew my objections to three of the petitioner's exhibits. One was Petitioner Exhibit 9, and that was the hospital letter that Ms. Albarus provided and we were never given previous disclosure of that.

THE COURT: Just for the record, you advised me at the time, however, that while you had not seen

the letter, you had been advised of the information contained in the letter.

MS. BALDWIN: No, Your Honor, no.

THE COURT: I misunderstood you then. I thought you said that it had been described in her report.

MS. BALDWIN: Then I misspoke, Your Honor. What was in the report was she said that she had a letter regarding some medical record or something like that. I think, in fact—it was very cryptic. I do not believe that it actually described what was in [3] the letter.

THE COURT: Maybe we better make that clear. Can you find in the—this is Exhibit 8, which is the Petitioner's Exhibit 8, which has been marked for identification only.

I assume that's what had been disclosed to you.

MS. BALDWIN: The only thing I see is on page four of that report. This is in Ms. Albarus'—on page three, this is describing the things that she relied on.

THE COURT: I guess I'm not on the same document as you. What I have is Plaintiff's Exhibit 8 marked for identification, entitled Expert Report of Carmeta Alberta Albarus. Page three just has a list.

MS. BALDWIN: Right, and it continues on to page four. The last thing on that list says "Letter of Admittance from Port Antonio Hospital." We were not provided with that.

In addition, we renew our objection to the actual exhibit, Petitioner's 8, which is the report, on the grounds that Ms. Albarus was not qualified to give the expert opinions that are expressed in that report. Her testimony from the stand did not encompass all of the opinions that are contained in that report.

The [4] report contains very extensive opinions regarding the effectiveness of counsel, regarding psychological diagnoses and observations that she was not qualified to give.

Then Petitioner's Exhibit 7, which was all of the affidavits from persons in Jamaica, which we object to on hearsay grounds.

I want to renew my objections to those matters, Your Honor.

THE COURT: Thank you.

I have under advisement your previous objections already made to 7 and 8. The only problem is number 9 and because of miscommunication between counsel and the Court, I understood, and I believe I said at the time that I was going to admit it because even though it had not been disclosed to counsel ahead of time that it had been described in material which counsel for the respondent had received. That is the ground that I admitted it, before.

I'll be glad to hear from the petitioner on that objection to number 9.

MR. CONNELL: With respect to the Attorney General, I think she was right the first time. I'd like to direct the Court to page 12 of the report, the top paragraph on page 12. There's similar language at the [5] bottom of page 27 in the report.

THE COURT: Anything further, Ms. Baldwin?

MS. BALDWIN: The only other thing I would point out from that, Your Honor, the letter which I had not seen until yesterday is actually dated 2006. In other words, from reading this, I would not know that what we had was something that was only generated and created very recently.

Anyway, Your Honor, I still object to it.

THE COURT: I'm going to—I'm not going to reconsider my decision earlier made to admit the letter.

I certainly accept counsel's representation that it had—the letter itself had not been disclosed. But as I said earlier, I think the information in the report had been previously disclosed to counsel.

MS. BALDWIN: Thank you, Your Honor.

I have one other brief motion. I do want to move to strike the petitioner's evidence. I believe that under the controlling standard of Strickland v. Washington, that they have failed to demonstrate that trial counsel's investigation of mitigation in this case fell below an objective standard of reasonableness. They have also failed to demonstrate a reasonable probability of a different result, meaning a reasonable probability that the jury would have given Edward Bell a **[6]** life sentence instead of a death sentence. I believe that their evidence fails to demonstrate either one of those prongs of Strickland, so I would move the Court to strike their evidence.

THE COURT: Treating counsel's motion as a motion for judgment as a matter of law, I will deny the motion.

You may proceed.

(All testimony transcribed previously under separate cover).

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,

Petitioner,

vs.

WILLIAM PAGE TRUE,

Respondent.

Civil Action No.
7:04cv00752

Harrisonburg, Virginia

July 6, 2006

TRANSCRIPT OF TESTIMONY AT EVIDENTIARY HEARING and CLOSING ARGUMENTS BEFORE THE HONORABLE JAMES P. JONES, UNITED STATES CHIEF DISTRICT JUDGE

* * *

[2] MS. BALDWIN: The Respondent calls Jud Fischel.

JUD FISCHEL, CALLED AS A WITNESS BY RESPONDENT, SWORN

DIRECT EXAMINATION

BY MS. BALDWIN:

Q. Will you please state your name for the record?

A. Jud Fischel.

Q. What is your occupation?

A. I'm an attorney, licensed in the Commonwealth of Virginia.

Q. How long have you been practicing law?

A. Since 1978; 28 years.

Q. At the time of your representation of Edward Bell, what percentage of your practice was in criminal?

A. Approximately 70 percent.

Q. At that time, how many other death penalty cases had you handled?

A. At that time, I believe I had done three or four. I don't remember the sequence. I believe Mr. Bell's was the fifth at that time, would have been the fifth.

Q. Are these cases that went to sentencing?

A. Yes, all of them had gone to sentencing.

Q. Did any of them get life sentences?

A. Excuse me? I'm having a little trouble hearing you. **[3]**

Q. Did any of them get life sentences?

A. All of them had gotten life sentences—excuse me. Three got life sentences. One actually, through a little bit of convolution, the first one actually ended up in an acquittal. It started out as a death penalty case. After conviction for first degree murder, the case—the conviction was set aside at the trial court level. On a retrial, it ended up in an acquittal.

Q. Are you familiar with the list that is required by the Virginia statute to be kept by the Public Defender Commission of Qualified Counsel in capital cases? Are you familiar with that?

A. With that process, yes.

Q. Are you on that list?

A. Yes, I have been from its inception.

Q. So would that have included the time when you represented Mr. Bell?

A. Yes.

Q. Before you went to law school, what did you do?

A. Between my graduation from college and my attendance in law school, I first worked for—well, in my last year of college, I worked as a uniform correctional officer in Montgomery County, Maryland. I then worked for six months with an internship in Washington, D.C., at the headquarters of the Federal [4] Bureau of Prisons. Then I became a probation officer at the Arlington County Virginia Juvenile Court and did that for a year-and-a-half. Then another approximate three years, I was a juvenile probation officer in the Fairfax County Juvenile Court.

During that whole time after, a year after I finished college, I had earned a Masters degree in criminal justice and I taught on an adjunct basis in the field of criminal justice and correctional administration at American University, as well as Northern Virginia Community College.

Q. In your position as a probation officer, did you have occasion to prepare a pre-sentence report or sentencing reports for the courts?

A. That was more or less half of what my responsibilities were, the other half being supervising both adults and juveniles assigned to my case load.

Q. Can you estimate how many such reports you might have prepared?

A. Usually eight to ten, sometimes twelve a month. So if you extrapolate, I'm going to estimate

somewhat in excess of 200, over the years. That is an estimate. I'm not going to say that's the exact number, by any means.

Q. Do you currently serve as a substitute judge? **[5]**

A. Not currently. I did serve in that position until 2006. That was for a total of 16 years.

Q. In what court?

A. I was appointed by the circuit court of—the 20th judicial district, which covered Rappahannock, Loudoun and Fauquier counties, but you're allowed to serve any place in the Commonwealth once appointed a substitute judge. As such, I served in the general district court and in the juvenile court and I always tried to emphasize juvenile court. That was primarily my interest.

In addition to the duties of a substitute judge, automatically with that went the responsibility of being a special justice, which meant a substitute judge would preside at involuntary civil, mental commitments when that was necessary for someone who appeared to be in need of being committed to a state mental institution.

Q. Now, in Bell's case, are you aware of the fact that before you came to represent him that Mr. Boyd and Mr. Snook represented Bell?

A. Yes, I'm aware of that and I was aware of it at the time.

Q. You're aware that Mr. Boyd then withdrew due to a conflict?

A. Yes. I don't know what that conflict was or if I **[6]** —I may have at the time, but I don't recall what the conflict was, sitting here today.

Q. Did you have any communication with Mr. Boyd about the case?

A. I don't remember having communication with him. I think all my communication was with Mr. Snook.

Q. So then you came to be appointed as co-counsel with Mr. Snook?

A. Correct.

Q. Then there came a time, did there not, where Mr. Snook withdrew from the case?

A. That is correct.

Q. I'm going to read to you from the petition for writ of habeas corpus. For the record, it's on page 110 of the petition for writ of habeas corpus filed in this case?

THE COURT: Is this the amended petition?

MS. BALDWIN: Your Honor, I believe it is.

I have an excerpt right in front of me, but I believe it is. It's page 110.

BY MS. BALDWIN:

Q. I'll ask you Mr. Fischel, if you agree with this statement or to respond to it, please. It says, "the mitigation effort was so deficient that before trial, appointed lawyer, Lloyd Snook, asked to withdraw in the [7] hopes of clearing the way for competent representation." If you would please respond to that. Do you agree with that?

A. I agree with that.

Q. You agree with that. Now, did you receive letters from Mr. Snook with regard to his withdrawal in this case?

A. I don't recall whether I received letters or if I received telephone calls or if I received the pleadings

themselves, but I know that I received information from Mr. Snook that led to that conclusion that you just read.

Q. I'd like for you to take a look at a document, please. Mr. Fischel, this is actually three letters. If you would take a look at those. Identify those for us, if you can.

A. I remember receiving this letter. I'd have to read the totality of it to answer anything concerning content, but as I have now read the first page, I remember receiving it.

Q. This would be the May 11, 2000, letter from Mr. Snook to you?

A. Yes. I remember it because of the issue about his chest pains, but I don't remember truly the rest of the content. [8]

Q. If you would look at the last paragraph on that first page.

A. Yes.

Q. If you would read the second sentence of that paragraph for the record?

A. You want me to read it out loud?

Q. Out loud, please.

A. "When I first made my application for Marie to be our mitigation expert, she said that she was readily available."

Q. Doesn't Mr. Snook in here essentially tell you that Ms. Deans just didn't do—

MR. CONNELL: Objection, leading.

THE COURT: Yes, ma'am. I think the letter certainly speaks for itself. I'll sustain the objection.

BY MS. BALDWIN:

Q. Mr. Fischel, if you would flip through the second letter in this and I'll ask if you can identify that letter. It's dated May 11, 2000.

A. Being my letter?

Q. Yes. Do you remember writing that letter or rather, what I'm asking is can you identify that as a letter you sent to Mr. Snook?

A. I can certainly identify it and I absolutely [9] remember writing this letter because it was so unusual, if you will.

Q. What did you advise Mr. Snook to do?

A. I advised him to file a motion to withdraw from the case.

Q. And he did that, didn't he?

A. He did that.

Q. The last letter in this, the very last page of this package, can you identify that as a letter that you also sent to Mr. Snook?

A. Yes, I can identify that as a letter I wrote under that date.

Q. That simply commemorates the fact you were able to obtain a continuance of the case with his withdrawal?

A. Yes.

MS. BALDWIN: Your Honor, I would move to admit this as the next Respondent's exhibit, which I believe is 8?

THE COURT: I think our records indicate it's #7. These letters will collectively be introduced and admitted as Respondent's Exhibit #7.

(Respondent's Exhibit #7 was marked for identification and admitted into evidence).

Mr. Fischel, let me ask you about one of your letters. You say you alerted Paul Thompson of the **[10]** problem. Who's that?

THE WITNESS: He was the Commonwealth Attorney prosecuting the case, the Commonwealth Attorney.

BY MS. BALDWIN:

Q. So Mr. Fischel, you were now in a situation where Mr. Snook had withdrawn and you had—

MR. CONNELL: Objection to leading, Your Honor.

MS. BALDWIN: I'm simply laying background for my question.

THE COURT: I understand.

Go ahead, ma'am.

MS. BALDWIN: It's just background, Your Honor. I don't think any of this is contested.

THE WITNESS: Ms. Baldwin, if I may interrupt, it must be a product of the aging process, but I truly am having trouble hearing. I don't know if that device can be turned up.

THE COURT: I'm having a problem hearing you, too.

MS. BALDWIN: Please let me know if you can't hear me.

THE WITNESS: I'll still accept it as being my problem mostly. **[11]**

BY MS. BALDWIN:

Q. My question is, so what did you do in the case, as far as counsel?

A. At that point, I don't recall when the next hearing would have been, but I did suggest to His Honor a replacement counsel because I contacted a

colleague of mine, Mr. Williams, and found out whether or not he would be interested in serving as co-counsel on this case and suggested Mr. Williams to Judge Hupp. My reasoning in suggesting Mr. Williams had many facets.

THE COURT: Let me just make sure I understand. I think this is correct. Mr. Snook was going to handle the mitigation aspect of the case. I don't mean that that was going to be his exclusive job, but was that going to be his primary focus? That's what it sort of indicates from the letter. Is that wrong?

THE WITNESS: Well, the dynamic of that was really not that clear at the early stage that I came in, Your Honor. We were still testing the waters with each other, given the fact that I was new to the case. I don't think we really had defined who was going to have what role. I think the important thing was that he at that point had already engaged Ms. Deans and felt a responsibility for her and what her role was going to be. **[12]**

THE COURT: You really didn't deal with Ms. Deans.

THE WITNESS: I didn't deal with Ms. Deans one iota at that point and he to me and through this letter took full responsibility for what did or didn't happen with Ms. Deans.

THE COURT: So you suggested Mr. Williams, who you had had prior experience with, I take it.

THE WITNESS: Yes. I'll be very candid. When you say prior experience, his office is between here and the Indian American restaurant across the street to my office. He'll tell you his own credentials when he testifies in a little bit, but he had been with

the Department of Social Services in Fauquier County before he became an attorney. Bluntly, a close personal friend. I knew him to be a very good trial attorney and because of his experience with the Department of Social Services as a social worker, social work supervisor, I knew he had excellent investigatory abilities when it came to social service type issues, social and human service type issues. It was for these reasons I wanted to bring somebody like him in.

THE COURT: He had no prior capital defense experience.

THE WITNESS: No. He, in fact, was not on [13] the list. I had to explain that to Judge Hupp and I asked Judge Hupp to use his authority to go beyond the list to appoint Mr. Williams.

THE COURT: So Mr. Williams came to be appointed through your recommendation.

THE WITNESS: Yes, sir.

THE COURT: Then was there a division of responsibilities? Did it come to pass that Mr. Williams was primarily responsible for the mitigation aspects of the case?

THE WITNESS: Yes. If there was labeling, I was doing, I don't want to say primarily, but if there was labeling, I was doing the legal pre-trial motions and the guilt phase and Mr. Williams was doing the mitigation phase, if you were to do the day-to-day primary function. But there was hardly a division of labor where we were out of contact and not staffing the case, not going over everything, not in close contact.

THE COURT: I mean, to put it in context and I'm sure every attorney in the courtroom who has

had experience understands when you work on a case with other lawyers on the same side, you all interact and, of course, take joint responsibility, but normally, you do divide up tasks.

THE WITNESS: Certainly. [14]

THE COURT: That was how the tasks were generally divided in your case.

THE WITNESS: Yes, sir.

THE COURT: Go ahead, Ms. Baldwin.

BY MS. BALDWIN:

Q. Mr. Fischel, despite the different tasks you may have been doing, was there a division of consultation? In other words, did you not know what he was doing or did he not know what you were doing? How did you work—how did the working relationship work, as far as professionally in this case?

A. Well, let me give you one very good example. I know that Mr. Williams had a lengthy consultation with Dr. Stejskal and Dr. Stejskal's staff at Charlottesville, down there. He went from Warrenton to Charlottesville and met with them. He told me sometime before he went that he was going to go have that meeting. There was no need for me to go to that meeting because it would have just been unnecessary for both of us to sit at that meeting and go over what they were going through. I didn't know in advance when he scheduled it. I certainly met with Mr. Williams when he came back. So when you ask that question, I didn't get involved in the minutiae of him scheduling a meeting. He and I sat down and went over the details on the return [15] of that meeting. That might be an example of what you're talking about.

When I sat down and worked on motions that I was drafting, he didn't need to know what I was doing in that regard in terms of my work product. But when it came time to schedule motions, obviously, he and I had to coordinate our calendars with the Court and the Commonwealth. So it was that kind of thing.

We weren't joined at the hip on a lots of things. On the other hand, we had to work very closely with—actually, our staff worked closely on a lot of these things with the clerk's office and Commonwealth staff.

Q. Did you work together on trial strategy?

A. Some parts, yes; some parts, no. But the overall big picture, definitely.

Q. With respect to, you mentioned Dr. Stejskal. How did he come to be involved in this case?

A. Mark had—no, Mark hadn't worked with him before. The first thing we did was we had to apply for a 3:1 expert.

Q. Why did you do that?

A. Why did we do that?

Q. Yes.

A. Well, to be very blunt, I think the failure of an attorney in a capital case to ask for a 3:1 expert, **[16]** whether you want to call it an expert in malpractice, whether you want to call it in effective assistance of counsel or whatever nasty phrase you want to call it, it's negative to do that. I think it's absolutely mandatory for an attorney to bring that service to bear on behalf of your client to make that assessment to find out how and if the assessment can help your client.

Q. Did you have some knowledge of Dr. Stejskal?

A. I had—and I have to tell you right now, I have not dug out my files and I looked at the affidavit I signed for you in anticipation of this court case and in that affidavit, I told you that I had worked with him in a prior case and my mind is flickering whether that's accurate or not at this point. I thought I had and now I'm uncertain whether he had been assigned by a Court in a prior case. I think he was assigned in one of my prior cases, but I'm uncertain about that. But I knew his reputation. Amongst the defense bar, he was highly regarded. But Judge Hupp appointed him.

Q. And that was not—you didn't ask for him, that was who he appointed?

A. I don't recall whether we asked for him specifically or not, to be very candid. I just don't recall.

Q. Did you meet with your client? **[17]**

A. Did—

Q. Did you meet with your client and talk to him?

A. In what context? In terms of Dr. Stejskal or the case?

Q. In terms of the case.

A. Of course.

THE COURT: Let me back up before I forget with Dr. Stejskal a moment. Your testimony is that you knew of his good reputation.

THE WITNESS: Yes, sir.

THE COURT: Although you may not have actually worked with him before. But you say you're not certain as to whether the trial judge appointed him on your recommendation or not?

THE WITNESS: I just don't recall.

THE COURT: Would not that have been sort of customary?

THE WITNESS: Just the opposite.

THE COURT: Really?

THE WITNESS: Yes, sir. It's one of those hat in hand things if you go to the judge and request a specific evaluator. Technically, you're not supposed to pick one. The list exists as to who is qualified to be an evaluator and the judges take it very frequently as an affront if you ask for a specific one. I have one [18] pending, believe it or not, Saturday. I've got 19 motions to argue in the circuit court of Loudoun County. It's going to be a great weekend. Judge Horne says that's the only time he can squeeze us in and I have asked for a specific evaluator and I had to be very diplomatic in the reasons why I was asking for her and what was involved and the fact I had used her in a prior case and et cetera, et cetera, et cetera. But it's not common to ask for a specific evaluator.

THE COURT: Even though the statute, in essence, requires on the defendant's motion. It comes at the defendant's motion.

THE WITNESS: And it's the judge's prerogative to pick who from the list.

THE COURT: That's very interesting.

In any event, the judge appointed this expert and he comes from the Institute of Law Psychiatry and Public Policy at UVA?

THE WITNESS: Correct.

THE COURT: You're familiar with that organization?

THE WITNESS: Yes.

THE COURT: Is it safe to say it has a very good reputation as a qualified sort of forensic source?

THE WITNESS: Yes. And to give it that, to **[19]** be very honest with you, the person I'm asking for in this other case is Dr. Ryan, who I used in my last capital case and who I hope to use in the current pending capital case, because of her expertise in addiction. Yes, I used them before and I hope to use them before.

THE COURT: It's safe to say they're widely used in criminal cases for forensics work in the state.

THE WITNESS: Absolutely.

THE COURT: Go ahead.

BY MS. BALDWIN:

Q. My question, Mr. Fischel, is you had meetings with your client, correct?

A. Correct.

Q. The question is, there's an allegation in this case that you could not understand your client and could not communicate with him and therefore, could not obtain mitigating evidence from him. I'd like for you to respond to that.

A. There's no question—Mr. Williams and I talked about this. I had a greater degree of trouble understanding Mr. Bell's accent than did Mr. William's. He's a got a patois that is harder for me. But Mr. Bell understood and did communicate. We did talk. I asked him to slow down. I asked him to slow it down. Sometimes **[20]** I took a pad and turned it over to him with a pen and he wrote the words. I got it out of him. But the interesting thing is most of what I worked on after Mr. Bell communicated to me what happened at the general

crime scene—and I don't want to make it sound like I was indifferent to him and I was indifferent to what he had to say and what he thought about. But most of what I had to do if you to really, really superficially generalize this, my work had to do with the law and my work had to do with investigating what other people saw and did or said they saw and did at the crime scene. Mr. Thompson, the then Commonwealth Attorney, had an open file policy, in terms of discovery. So I had access to police reports. I had access to police officers. I had access to autopsy materials. I had access to all kinds of DNA, all the stuff you would investigate. So without minimizing what Mr. Bell had to tell me, and of course it was a lot and it was crucial and it was important, it was less important in the sense of the crime and guilt and innocence than it was for Mr. Williams as it related to mitigation. And Mr. Williams, I think, is going to testify differently about his issues about communication.

Q. Now, so you had a client and also who denied that he did this crime; is that correct? **[21]**

A. Absolutely, absolutely.

Q. And so did you believe that that gave you certain obligations in the case?

A. Certain obligations?

Q. Yes, in defending him.

A. Yes, it gave me the primary obligation to defend him as hard as we could as to guilt and innocence.

Q. Did you discuss with him anything to do with what a capital case is composed of, a guilt phase and a sentencing phase?

A. Yes.

Q. Did you discuss with him the importance of mitigating evidence?

A. Yes, we both did, Mr. Williams and myself. We both did.

Q. Did you ask him to help you with finding mitigating evidence?

A. I don't recall if I did that specifically, but Mr. Williams did, I know.

Q. Did you do anything in particular with respect to trying to find mitigating evidence in records?

A. Yes, I did.

Q. What was that?

A. Well, it started out that one of the defenses we were raising had to do with my belief that part of his **[22]** initial arrest and detention violated the Vienna Convention because he was a foreign national. That happened to be unsuccessful, but it was what we started out with at the very beginning. In doing so, I established good working professional relationships with two individuals at this point. The names are beyond my recollection. I'm sure if I had access to the file, I could dig them out, but at the Jamaican consulate. After a period of time when Mr. Williams told me what he needed that was not forthcoming, I contacted those two individuals and frankly, at this point, I had become on a first name basis with these two people, a gentleman and a lady, and we made an informal request in writing for them to provide me with a series of records. I can't remember what they were. I know they were school records. I don't remember—I think they were health records, but a series of records, a paper trail of things in Jamaica about Mr. Bell. Those people at the consulate made, as far as I understand, a good faith effort to get those

things through their own government and they were unsuccessful. Then when I read Dr. Stejskal's report, he was unsuccessful with his own effort to get them from Jamaica through, I think, a family member. And I don't recall the lady's name who worked for Mr. Bell's current counsel, a woman in **[23]** Jamaica, who I believe is a social worker or mitigation expert and again, I don't recall her name. She made the same effort and those same records were still unavailable. But I did make that effort through the Jamaican consulate.

Q. Were you aware at the time that both you and Dr. Stejskal were pursuing the same thing through the embassy?

A. Actually, I pursued it before he did, but I didn't know he was doing the same thing after I did.

Q. What was your expectation with your 3:1 expert?

A. I'm sorry?

Q. What was your expectation with 3:1 expert?

A. When I start out with a 3:1 expert, I have no expectation. I only have hope. I don't know what they're going to show us. I don't know what they're going to reveal to us. I don't know if they're going to be on the witness stand. I don't know if they're not going to be on the witness stand. They may reveal something that proves to be mitigating. They may reveal something that may be so harmful, I don't want that report to go to the Commonwealth. So it's just hopeful that they'll reveal something.

Q. What happened in this case?

A. Well, I have to give it context, first of all. **[24]** There's a whole context about this case that made mitigation itself very difficult.

Q. Please explain.

A. One of the things that I've learned after more than ten years, twelve years, of going to seminars, learning how to try capital cases and indeed, trying capital cases, is that when you fight a capital case to the hilt, to the utmost, you put yourself in a very difficult posture with a jury if they convict for capital murder because when you then come back at the mitigation phase and say, okay, we told you this person did not commit capital murder and you don't believe us and you've convicted him or her, but usually, and this is him, so I'll just stay gender positive, if you will, you've convicted him of capital murder, now we want you to forget all of that and show him mercy and we'll explain why he didn't really mean to do it. Basically, that's pretty darn insulting to a jury.

THE COURT: Let me ask you about that opinion, which I guess maybe you had expressed in your affidavit.

Is that really the choice? That's what concerns me, Mr. Fischel. Is it really the choice of saying to the jury, he didn't mean to do it? In the capital cases that I have—that have been tried before **[25]** me, of course in a different court, but where a vigorous defense is put up, the attorneys, defense attorneys don't say that. They say, ladies and gentlemen, you have found him guilty of first degree murder. We don't agree with that verdict, but we want to—you have a very important job right now and we want to show you who this person is so that you can better make that decision. Isn't that what you say to the jury, not he didn't mean to do it? Explain to me a little more how you see this conflict.

THE WITNESS: Let me give it to you by—

THE COURT: It seems to me what you're saying is if you really fight hard at the guilt/innocence phase, then you kind of give up if the jury finds the defendant guilty.

THE WITNESS: If I may, let me show you two cases by comparison, one that was very successful, one that was unsuccessful.

In a case that I last tried, the defendant cut another man's throat, stabbed him, left him to bleed to death while he stole his drugs, stole his money, sat in the house with the guy's wife tied to a bed, did his drugs and just watched him bleed out. And then he left. We put on a case where we tried to show that it was **[26]** either a case of reverse progression, self-defense, second degree murder or capital murder. The jury wouldn't accept that fact pattern that we put on with the defendant testifying and they did, indeed, convict of capital. But by using the mitigation specialist and showing the extreme, almost 30-year pattern of addiction, they accepted the fact of, A, we do not deny he was involved in the crime or the activity which we tried to call not a crime, unsuccessfully; but, B, we could show what was involved in his life, why he was involved in this pattern of behavior and how it led up to the event. In polling, privately polling the jury afterwards, those who would speak to us, they told us they were most impressed with the fact that our guy was so terribly addicted and they were willing to show him mercy.

Now, if I revert back to the beginning of this case, Mr. Bell's case, we have a totally different type of context and the historical context. If we go back in

years before Mr. Bell was arrested, I told Mr. Williams that when we lost our change of venue motion, we were in deep trouble and Mr. Bell was in deep trouble, if convicted. The reason I came to that conclusion was because I knew the newspaper articles, the occasional investigative reporting, if you will; I **[27]** knew the television stories in the Washington D.C. television channels; I knew full well because of family that lived in even Front Royal what the concerns were of the lawful community in Winchester for—and it's true it's a stereotype and I'm not labeling every person in Winchester who is Jamaican—but there has been a Jamaican sub culture, an unlawful, illegal Jamaican sub culture, I will emphasize, for many years, that's drug dealing, that goes back and forth to the race track in Charlestown, that uses that for an illegal trafficking across state lines. And I was very concerned that Mr. Bell, if convicted by a Winchester jury who would properly answer Judge Hupp's questions and our questions, and I think in their heart and in their minds would be truthful during voir dire, going into the guilt phase, that that lack of—that lack of bias in the guilt phase would quickly loose itself in the penalty phase and then the stereo types and the emotion and the problems associated with this huge funeral, and Mr. Williams told me he thought he recalled a newspaper article that said 3,000 people came out to view the funeral for Sgt. Timbrook. I thought I remembered 4,000. I don't think it matters. The photograph I saw was just astonishing as the streets were lined. He was a fallen hero. He had done everything right in that **[28]** city. He was just, as I say, a fallen hero and everybody in that city

had such profound respect for the man. He was loved by many, respected by everybody.

As I say, when we got to that point that we lost the venue motion and accepting, maybe even naively, but accepting the idea that those potential jurors could be honestly and dispassionately answering those questions to qualify for that jury at the front end, I just was not sure there was any mitigation, to be honest. But that doesn't mean we drop the ball and don't do anything.

THE COURT: I understand what you're saying and I fully appreciate the difficult, difficult case you had.

THE WITNESS: But there's more to tell you, but go ahead, sir.

THE COURT: Let me just concentrate my thoughts a little bit and you can respond.

You had a very, very difficult case for the reasons you've mentioned: A high profile victim, loved victim, in a relatively small community, allegedly murdered wantonly, by a member of a suspect sub group in the community, as you described. In many ways, a nightmare of a case. You'll probably agree with me.

THE WITNESS: Yes. **[29]**

THE COURT: But how does that translate into what essentially was a decision, which is apparent from the record, in which you presented literally no mitigating evidence? There were seven pages of transcript of the defense's case in the sentencing phase. Two witnesses were called. There wasn't a single question asked about Mr. Bell, about his background, about anything about him. His two relatives were asked about sort of the effect of this tragedy on them and I think his sister said, well, her

children were harassed at school. His father said something like, well, if he did it, he should be punished, and that was it.

How does the nightmare of a case that you describe, and I fully accept, translate into essentially no mitigating evidence? In fact, the Commonwealth's Attorney told the jury in closing arguments, they haven't presented one wit, one iota of mitigation, which was essentially true. How did that come about? Tell me, explain to me, how that happened.

THE WITNESS: Well, the first thing is that if—if is the wrong word to start off with. When I received my copy of Dr. Stejskal's current affidavit, I was flabbergasted because it's in direct contradiction with his report and I don't know how you can reconcile **[30]** reading one next to the other because he told us not to use him, he would only hurt us because he found nothing that would help us. I'm not going to recount the report because it's either in evidence or he's testified to it.

THE COURT: There's no question about that. He certainly told you in his report that there wasn't any mental health issues that you could use in mitigation and that he nor any other mental health expert should be called on the defendant's behalf.

THE WITNESS: Right. So the number one—

THE COURT: I take it you relied on that.

THE WITNESS: Absolutely.

Secondly, the thought that next runs through your mind is, well, Mr. Bell is a father and you want to bring in the mother of his children. Well, that's a nice starting point. But Mr. Bell is the father of multiple children with multiple women which by

itself doesn't particularly bother me. I'm not prudish about other people and their personal choices, but the history on all of them is that Mr. Bell wasn't supporting any of those children, was providing no child support. I guess it goes back to my years, all those years I was serving as a substitute judge in juvenile court and how that comes across to the public when you're not supporting children. And it went back to Mr. Williams' years **[31]** working in social services and seeing the effect on all those families when you're not paying child support and we're thinking about putting those women on the witness stand to, on one hand, say, Eddie—I don't want to demean him—but for the women to be saying, Eddie is a wonderful father and Mr. Thompson, on cross-examination, and how much child support does he pay you, what does he do, et cetera, et cetera, et cetera, and making him look bad in front of the jury.

Then if you look at the record put forth of the prior unadjudicated bad acts, there is a long history of abusive behavior by Mr. Bell against these very women. So how do we put them on the witness stand to say he's a wonderful man, he treats me so well, as he beats them, as he molests them?

There's one incident about groping a woman in a very suggestive, bad way. So we have that. Our options kept vanishing. If you want to call it a checklist, instead of checking them, we crossed them off.

The worst thing that happened to us, and I apologize for not remembering her name because I did not deal with her, Mr. Williams dealt with her, he had a wonderful sister in Jamaica who was going

to come to testify. She died. She was going to be our primary **[32]** witness and she died not terribly long before the trial.

I guess the easiest answer, it's somewhat simplistic and it's not meant to be simplistic, but it summarizes the situation; we didn't have a lot to deal with.

THE COURT: Did you consider—I mean, you indicated that you knew that there was at least some indication that he had affection for his children, that he had a good relationship with his children and there's been some evidence of that and you indicate that you had some knowledge of that also. But you felt precluded from getting into that because of the down side.

THE WITNESS: Yes, sir.

THE COURT: Did you ever consider that it couldn't get any worse? Your choice was to present zero mitigating evidence, which essentially you did except to show that he did have relatives and they were flesh and blood. He had a father and a sister. But other than that, without really any information about him to humanize him at all, did you consider, well, it just couldn't get any worse than what we've got now and even if there's risk of alienating this Winchester jury, which as you correctly point out—because of the venue situation puts you in a difficult position—that why not try something in terms of his family life, even if **[33]** it had a down side, if there was somewhat of a double-edged sword to it? Was that a consideration or is it your recollection it was just sort of agreed, understood that once his sister died, the main mitigating person—

THE WITNESS: I guess I only saw it as a single-edged sword.

THE COURT: You didn't see anything but down.

THE WITNESS: Only down.

I guess the only thing I can rely on in asking—answering that question to you, sir, is that the only comfort level I have in having people, such as Mr. Bell's current attorneys who have asked the questions through their petitions and Your Honor in asking your questions now, is that this was not done in a vacuum with Mr. Williams and myself. We relied on Professor Groot, who I'm sure you're familiar with what he did during the time he was alive at W&L.

THE COURT: That's a good point. Why don't you discuss that and first explain for the record who Dr. Groot was? Unfortunately, he recently is deceased.

THE WITNESS: The law school at Washington and Lee University created, first with Professor Bill Geimer and then under Professor Roger Groot and **[34]** currently with David Bruck, runs a clinic, a second or third-year clinic, called the Capital Case Clearinghouse, which has the dual or three-part purpose of allowing certain students to participate in a research and writing program. They hold a once a year seminar for capital defenders and they also assist capital defenders on working on their specific cases, if they apply for assistance.

In this particular case—and that's one of the places any go annually for a one day seminar. I think I've gone nine out of twelve years they've held the seminar and it's oriented exclusively for

defenders. Prosecutors are not allowed to attend. Judges are allowed to attend.

MS. BALDWIN: Can I ask Mr. Fischel to speak up?

THE COURT: Mr. Fischel and I have been having a conversation here and may have excluded everyone else.

THE WITNESS: That program, it allows for you to either call, e-mail, now that we have that modern invention or to physically go down to the university and meet with the professor, usually two students, a second and third-year student are assigned to you, and they'll either answer specific legal research requests and/or **[35]** strategize the case with you, the professor and the two students. So various issues on this case were proposed and presented to Professor Groot. The issue of mitigation on this case because it was so troublesome was presented to him and the ultimate strategy for mitigation was presented to him for a second opinion. The very issues we're litigating today with me being the witness on the witness stand and Mr. Williams about to come on the witness stand when everybody is done with me, not that it's going to supersede you in any way, Your Honor, but it certainly influenced me and Mr. Williams. We received Professor Groot's seal of approval.

THE COURT: Again, for the record, what was your strategy then in terms of trying to seek a life sentence for Mr. Bell?

THE WITNESS: Well, we had a four-fold strategy and I've put it in the affidavit, not to short-circuit you, but to certainly make the record and as the U.S. Supreme Court recognizes, a litigation

strategy was our first strategy and it was to win the case.

THE COURT: I know, but it was particular in regard to mitigation. When you came to the point that Mr. Bell had been convicted by the jury, what were you **[36]** going to do in that eventuality?

THE WITNESS: Are you asking what the plan was contemplating conviction or the jury had already returned?

THE COURT: Either or both. I assume you at least contemplated that he might be convicted.

THE WITNESS: Months before, I had, without knowing these very fine people, I met Sgt. Timbrook's family. I didn't know what they were about. I didn't know who they were. I, of course, found out that they wanted the punishment, if Mr. Bell was convicted, that was imposed. So I abandoned that. Came to like them very much. I think certainly Mr. Timbrook, Sr., and I established a very nice rapport. So that was not an avenue open to us, to see if they would have any interest in possibly negotiating the plea agreement that would involve a life sentence. They wanted the Commonwealth to pursue the way they did.

So then we were reduced to only the issue of using Dr. Stejskal and that fell apart when he said there was no basis to utilize him and then we pursued the way we did.

THE COURT: And what was that?

THE WITNESS: We explored whether or not there were, through Dr. Stejskal, even though it was **[37]** don't use his report, there was all the data that he gathered for us and sifting that, were there going to be any information, any family members,

anything of that nature that we could utilize to testify. As I say, the death of his sister in Jamaica left us with basically an empty glass.

THE COURT: Because you excluded any of his other family members because of this concern that you had about what? Can you be more precise about that, that he was not a good provider for these children, essentially?

THE WITNESS: Yeah, the variety of things I've talked around, talked to.

THE COURT: I mean, was it the fact that he had multiple children or multiple wives? Was there a moral concern that the jury wouldn't like that?

THE WITNESS: One wife, others, no marriage. The wife was still in Jamaica. No divorce. I was less concerned about the legal status with the women. Almost unconcerned about that. If he had been sending checks to all of them, giving cash to all of them, if somebody would have testified that they were being provided for, I don't think we would have worried about it. No job. No visible means of support, leading into some questioning, some conclusion, some leap that a juror **[38]** might make about where's the money coming from? Evidence of the trips to and from Charlestown. What did that mean to a juror? Even though somebody would probably have to make a leap, I didn't know that they wouldn't make it. I think every lawyer in the world takes the guess that jurors come to conclusions they're not supposed to with facts not in evidence. They believe what they want to believe.

So we just were looking at that point at minimizing the damage.

THE COURT: So you come down to minimizing the damage. So an hour before the argument or before the mitigation phase starts, what did you and Mr. Williams decide to do? What was it that you were going to—Mr. Williams, I believe, argued, did he not, the mitigation phase?

THE WITNESS: Yes.

THE COURT: What was he going to say? What did you decide, what was going to be the strategy? Just he's a bad person and just lock him up and that will be worse than death?

THE WITNESS: That was one of his arguments. We were also at that point trying to—we were on the verge of putting on evidence of life in prison is worse than death. We were on the verge of putting on an **[39]** inmate who was a former client of Mr. Williams to testify about prison life. But a recent case said you can't do that and Judge Hupp adhered to that so that we were precluded at that gate and we were well prepared for that. I had just done that in a case in Fauquier in an absolutely horrible capital case that was very successful in getting a life sentence. One of the jurors said that he was very pleased to send my client to prison for the rest of his life after that evidence from this particular inmate that we had testify and we had in both cases the same penologist ready to testify, but Judge Hupp wouldn't approve it. That was another aspect I forgot to tell you. I'm sorry, it just clicked. That was going to be part of what we were going to do, but that was disapproved at almost the last minute. So there was going to be an effort to convince the jury that prison was much worse than the death sentence and

making him live the rest of his life in such a horrible place was a fate worse than.

THE COURT: I'm sorry, Ms. Baldwin. Go ahead, please, ma'am.

BY MS. BALDWIN:

Q. Mr. Fischel, were you aware of any, in this case aware of what I will call traditional mitigating evidence, such as mental illness or neglect or abuse or [40] mental retardation?

A. No, as to mental retardation. No, as to—well, the abuse issue or question, there was some discussion of it from the viewpoint of whether or not there was corporal punishment used in the home while in Jamaica, but that was sloughed off by the sisters saying, yeah, we were disciplined that way at home.

Q. So those categories I just listed were actually looked at by you and Mr. Williams.

A. I don't think that I looked at them myself other than the mental retardation one as it related to the things Dr. Stejskal said, no, they don't exist. But the more, what I'll call social rather than mental health type issues, I didn't look at. I relied upon Mr. Williams and Dr. Stejskal to look at those together.

Q. So either you or someone for you was looking for them, I guess is what my question is.

A. I would say under the laws of agency, somebody on our team looked at them.

Q. Why did you not continue with Marie Deans or hire another mitigation specialist?

A. I didn't continue with Marie Deans because I guess you could say, in essence, I fired her. I was dissatisfied with what she hadn't done for

Mr. Snook. I couldn't understand why historically she was reputed to [41] be the—no play on words—but the dean of mitigation specialty and I couldn't understand why she needed any kind of real big direction from Mr. Snook. Their offices are very close. If she couldn't get return phone calls from him, why she didn't just walk in the front door and say, what's going on, Mr. Snook. She, as I find out, was very tied up with another case anyway. I didn't know who the other person in that letter was, from Mr. Snook, and I just figured that we could go ahead and do what we had to do. As it turns out, when I compare Dr. Stejskal's report to the report from the investigator from Jamaica, although the investigator from Jamaica seems to have written a longer report, maybe a little more detail about some of the people there, the conclusionary information seems to be all the same. So the reality is, it wouldn't have made any difference.

Q. Have you ever used a mitigation specialist?

A. Have I ever used one?

Q. Yes.

A. Yes.

Q. So why didn't you get another one in this case, a different one?

A. That's the specific reason I brought in Mr. Williams. Given his background as a social worker of 20 [42] years experience, I felt he could either do or get done what had to be done. And bottom line, when I look at Dr. Stejskal's report, that report is the detailed social history one needs before you get into the mental health testimony.

Q. Your testimony when you were speaking with Judge Jones, did you testify that your belief is that

to humanize Edward Bell would have caused—had more of a down side than it would have had an up side?

A. My feeling in that regard is that if there was no such thing as cross-examination, we could have humanized Mr. Bell. I wasn't worried about what we were going to ask. I was worried about or convinced even what Mr. Thompson was going to do to those witnesses.

Q. Were you concerned about any comparisons to—

MR. CONNELL: Objection; leading, Your Honor.

THE COURT: Yes, ma'am, if you'd rephrase your question, please.

BY MS. BALDWIN:

Q. Were there any other considerations, anything else that you took into consideration along those lines with what you thought the prosecutor would do with these witnesses?

THE COURT: You mentioned the support for **[43]** children and domestic violence issues. Were there any other things?

THE WITNESS: Well, I don't recall the whole list, but if you simply go to the list of unadjudicated prior bad acts, you can just go down that list and just peel those things off there and every effort to humanize Mr. Bell could be contradicted by that list.

BY MS. BALDWIN:

Q. Did you know anything about the status of Officer Timbrook's widow?

A. I knew she was pregnant.

Q. Was that a consideration in this that you thought the prosecutor would use?

A. To a degree. I mean, it was obvious that while we would throw up the loving and caring relationship Mr. Bell would have with his children, there would be Kelly Timbrook, pregnant, about to bear a child that would never see his or her father and there would be Kelly Timbrook raising a child without a husband. I think that would more than offset anything good that would be said about Mr. Bell, and I don't mean to sit here and insult the gentleman, he's sitting on the side of the room, but Mr. Bell, who isn't supporting his children.

Q. Were those considerations at the time of the trial? [44]

A. Absolutely.

Q. Now, you talked a little bit about the sociology of the Town of Winchester with respect to the Charlestown race track. Did that have any particular meaning that you felt jurors would assign to it if that was brought out about Bell going to the race track?

A. Obviously, I don't know what would be in the head of each juror in regard to this, but I can tell you that I knew that the darkest parking lot area at that time—Charlestown didn't have the same lighting it does now—but that was known area for drug dealing, money transfers, gambling at Charlestown was a way for money laundering and years before, Charlestown was one of the first—or Charlestown, Winchester connection, was the basis of one of the first interstate drug task forces between federal and state agencies. I had to—just had to believe because the newspaper articles I had read and as I say, the Washington D.C. television market news coverage, that the citizens of Winchester were aware of it, too.

Q. Did you know any nicknames for Edward Bell?

A. Police officers told me that Mr. Bell's nickname was Fast Eddie.

MS. BALDWIN: Thank you. I don't have any other questions. **[45]**

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. CONNELL:

Q. Good morning, Mr. Fischel.

A. Good morning.

Q. Same thing. If you can't hear me, pipe up and I'll talk louder.

A. I'll take the liberty.

Q. You testified before you went to law school, you were a juvenile probation officer in Arlington and Fairfax?

A. Yes, sir.

Q. Part of your job there was to prepare PSR's, pre-sentence reports?

A. Yes, sir.

Q. Actually, in Juvenile Court, they call me INR's?

A. INR, Investigation and Report.

Q. Said about half your work load was preparing pre-sentence reports, right?

A. Yes.

Q. At any given time, how many pre-sentence reports did you have on your plate?

A. Sometimes eight, sometimes twelve. It varied.

Q. How many hours did you put into a pre-sentence report, a range? **[46]**

A. I don't know.

Q. Sometimes 10, sometimes 15?

A. Sometimes more, sometimes a little less. Hard to answer that question. Again, you're also going back some years.

Q. Sure. But I just want to make clear, you're not suggesting to the Court that a juvenile pre-sentence report is equivalent of a capital pre-trial investigation that would take hundreds of hours; right?

A. Certainly not.

Q. You testified on direct examination that you considered the mitigation investigation which took place before Mr. Williams joined the case to be deficient; correct?

A. To be?

Q. Deficient. That was the statement the Attorney General read to you.

A. As far as I was aware, he was nonexistent.

Q. But you knew Mr. Snook had interviewed Mr. Bell.

A. Yes.

Q. You knew that Mr. Snook had interviewed Mr. Bell's sisters.

A. No.

Q. You didn't know that?

A. No. **[47]**

Q. Did you know that Mr. Snook had interviewed Mr. Bell's mother?

A. I didn't know that was possible because of dementia.

Q. You felt—what do you mean, dementia?

A. I was advised that had Mrs. Bell had dementia.

Q. What do you mean by dementia? Do you mean Alzheimer's?

A. I'm using it in the sense that lay people would use it.

Q. I'd like to take you through a little bit of a chronology in the case. If you need anything to refresh your recollection, I'm just going to hit the high points relevant to mitigation. If you need anything to refresh your recollection, just let me know and I'll provide you with the documentation.

You weren't the first attorney appointed in the case, correct?

A. Correct.

Q. First the Public Defender's office and Mr. Snook were appointed, correct?

A. Correct.

Q. Public defender office, Mr. Boyd, withdrew.

A. Yes.

Q. And you were appointed sometime between January **[48]** 11 and January 20 of 2000, correct?

A. I think it's easier to say, I think so.

Q. You knew that at the term day, the first appearance in the circuit court, Mr. Snook had argued for the appointment of a mitigation specialist at that time.

A. You're saying I knew that?

Q. Did you know that?

A. I can't say that with certainty.

Q. So the first hearing—

A. All I can tell you, if that's what the record says, I'll have to agree with it.

Q. The first hearing you appeared at was February 1, 2000, correct?

A. Again, I'll rely on the record rather than what you're representing to me.

Q. And when you rely on the record, do you agree that you're listed as counsel of record on February 1, 2000?

A. Again, I'm not trying to be difficult with you. I want to be accurate. If that's what the circuit court record says, I am in total agreement with the circuit court record.

Q. That was a hearing—you do recall, however, the first hearing you were involved in was a hearing on the **[49]** motion for appointment of mitigation specialist.

A. I don't recall that.

Q. Do you recall hearing Mr. Snook argue that the motion for mitigation specialist was completely separate from the statute we all commonly call 3:1?

A. Say that again, please.

Q. Do you recall hearing Mr. Snook, who conducted that argument, argue that his request for a mitigation specialist was completely different than the request for an expert under 3:1?

A. I don't recall him saying that, but I would agree with him.

Q. Right. In fact, you yourself had made the argument many times. A mitigation specialist is a different creature than a 3:1 expert, correct?

A. Certainly.

Q. Do you recall that about six weeks later, on March 17, 2000, there was a consent order entered for the appointment of an investigator, Mr. Blackwell?

A. I recall the appointment. I don't recall the date. Again, the same thing. I just don't recall dates, sitting here.

Q. And you recall that was a consent order, in fact.

A. I don't recall it being a consent order. Again, I'm not looking at it. **[50]**

Q. That investigator, he never did anything for you. He never billed you. He never performed any investigation for you, correct?

A. He was a bust.

Q. Now, on—in May, on May 11, Mr. Snook advised you in the letter that you looked at that he had not gotten any mitigation investigation done as far as he was concerned.

A. Correct.

Q. He took full responsibility, in your opinion.

A. Correct.

Q. Because of that, you filed a motion for continuance.

A. Correct.

Q. And you told the Court that—I'm sorry. You told the Court about the lack of any mitigation investigation, correct?

A. Correct.

Q. And at that time, you had been trusting—you actually took some responsibility and said as co-counsel, I trusted Mr. Snook to perform this mitigation investigation.

A. Correct.

Q. But you weren't double checking his work throughout the months, correct? **[51]**

A. Correct.

Q. And you didn't, during that time, perform any mitigation investigation yourself, correct?

A. Correct.

Q. And you actually discussed with Mr. Bell, Mr. Snook's failure to perform a mitigation investigation, correct?

A. Correct.

Q. And he was, I think your word was, distressed that Mr. Snook had not performed any mitigation investigation; correct?

A. That's right.

Q. He wanted a mitigation investigation to be performed.

A. That's right.

Q. And then the next day, there was a hearing on the motion to withdraw, correct?

A. Yes.

Q. You actually represented to the Court that you were, I quote, and I can show you the page if you need it, "that you were now witnessing ineffective assistance of counsel in the midst of the case, unique in your experience."

A. Yes.

Q. And you represented to the Court there was only a **[52]** dabbling of mitigation evidence and you needed a continuance to develop more.

A. I don't remember that language, but if you're quoting from the record, I'll accept that.

Q. You informed the Court you thought Mr. Williams would be a good choice.

A. Again, if you're quoting—

Q. That's not a quote. But you did tell the Court you thought Mr. Williams would be a good choice.

A. I did, but the exact words, I don't recall them specifically.

Q. And you were candid with the Court about he wasn't on the list, he had never done a capital case, didn't have capital experience, never done mitigation investigation and you were candid with the Court about those things.

A. Yes.

Q. You told the Court, look, I'll supervise him, I have experience in capital cases, we'll work together, correct?

A. That's correct.

Q. About six weeks later, you received a memo about mitigation from Mr. Williams, is that correct? Do you remember that memo?

A. I do not. **[53]**

Q. I'll show you that.

MR. CONNELL: Your Honor, if we might have this marked for identification as petitioner's next number?

THE COURT: This will be Petitioner's Exhibit #10, marked for identification.

MR. CONNELL: Thank you, sir.

(Petitioner Exhibit #10 was marked for identification).

BY MR. CONNELL:

Q. Mr. Fischel, do you have in front of you Petitioner's Exhibit #10, for identification?

A. Is that the memo dated July 21, 2000?

Q. Yes, sir.

A. I have it and I'm almost done reading it.

Q. Take your time?

A. I've read it.

Q. Do you recall receiving that memo?

A. Specifically recall of receiving it, no. But I've read it and so I'm familiar with what it says.

Q. I'm not asking you to commit whether you received it on July 21 precisely, but you recall sometime during the summer of 2000 receiving this memorandum; correct?

A. I can tell you I recognize the date stamp at the top as being mine. So I can tell you my office received **[54]** it that day.

Q. And at some time around then, maybe not exactly that date, you read it and reviewed it; correct?

A. Sure.

Q. Would you read the very first paragraph to us?

A. "After interviews with the client, sisters and his mother, it appears as if there is little evidence that would assist in mitigating the case against Eddie Bell."

Q. At the time that you received this memo, were you surprised by the conclusion that there's little evidence that would assist in mitigating the case against Eddie Bell?

A. I don't know that I would use the word surprised.

Q. Were you surprised at the fact as of this period of time in July that Mr. Williams had only

interviewed Mr. Bell, himself, two of his sisters and his mother?

A. I'm not going to use the word surprised.

Q. What word would you use, sir; concerned?

A. No. You have to understand, I was looking at it from the point of view that Mr. Williams was still new to capital litigation and at that point, I just knew that I had to focus him on more of what had to be done and that's what happened and that's when we—I don't recall the date that we got this case to Dr. Stejskal, **[55]** but I knew we needed to get more from Jamaica and I saw the sister was going. I knew I had already tried to get materials from Jamaica and I knew it was a long painstaking process. My reaction, more than surprise, was just a conclusion he was premature in coming to a conclusion. That's all.

Q. So if I correctly understand you, you decided this was a premature conclusion.

A. Right.

Q. That clearly, it was too early to come to a conclusion that there was little or no mitigation evidence after just interviewing a few immediate family members.

A. Right.

Q. I want to ask you about a few of the specific facts, however. Were you surprised to learn from this memo that Mr. Williams believed that 10th grade was the last year of high school in Jamaica?

A. Well—

Q. Did you know otherwise?

A. You're asking me two questions at once. Go to the first question, please. What was the first one?

Q. The first question is were you surprised to learn that Mr. Williams believed that 10th grade was the highest grade in Jamaica? **[56]**

A. There you go again with the word surprised.

Q. Tell me what your reaction was.

A. Thank you. My reaction was, he asked the family and got an answer. I think to rely on the family for that information was a good initial and a safe initial reaction. I couldn't tell you what the last grade of high school is in England. I know they have what they call forms. So I couldn't tell you what the last grade of high school is in Jamaica, which is based on an English system. So for him to make that conclusion didn't sway me one way or the other.

Q. You felt it was premature to make a conclusion, but could bear further investigation?

A. Yeah. It could be correct. It just didn't mean anything to me at that point. It seemed at that point that Eddie completed high school. That's all. And it required getting the paper.

Q. Likewise, it appeared to you at that time that Mr. Williams had concluded that had Mr. Bell had no criminal record whatsoever in Jamaica; correct?

A. Subject to getting the paperwork.

Q. And similarly, you believe the same situation applied to Mr. Williams' conclusion that Bell's mother had Alzheimer's disease.

A. That's not in this report. **[57]**

Q. Would you look at the second paragraph from bottom?

A. Did I miss something in reading it quickly here? Yeah, I'm sorry. According to the family and

interviewing the mother, it appears she suffers from Alzheimer's.

Q. As we sit here today, do you know that 10th grade is not the highest grade in Jamaica?

A. No.

Q. As we sit here today, do you know that Bell's mother does not have Alzheimer's disease?

A. No, I never followed up on that after the case was over.

Q. How long, roughly, after you got this memo, did you next speak with Mr. Williams?

A. I don't know.

Q. I mean, you told us you were in close consultation. Was it the next day, a few weeks?

A. You're talking about five years and—almost six years ago. Now how am I supposed to remember that?

Q. Did you take notes of your conversations?

A. I don't know.

Q. Is it fair to say that sometime within the next month, you spoke to Mr. Williams, after receiving this memo? **[58]**

A. I don't know the answer to that.

Q. Are you saying it's possible you went an entire month after this without speaking with Mr. Williams?

A. I don't know. You know why? It's summertime. Vacations. I really can't tell you. I'm not trying to give you a hard answer.

Q. Roughly when—a moment ago, you told us that you had concluded that Mr. Williams was, through his inexperience, making a premature conclusion; correct?

A. Yes.

Q. Did you ever communicate that to Mr. Williams?

A. I don't know if I criticized him and said this premature or if I simply said, let's do thus and so. I don't know that it's necessary to criticize somebody as opposed to just getting the job rerouted.

Q. What did you tell him to do?

A. Again, six years ago, I can't tell you. I know I can't tell you that I remember the exact reaction to it.

Q. Is it possible that you didn't give him guidance on what he should do?

A. Is it possible? I don't know how to answer that question.

Q. Is it your testimony that you gave him guidance on what to do, as you said, thus and so.

A. I can't answer either of those questions with **[59]** certainty. I can't tell you it's possible, I can't tell you it's impossible.

Q. So essentially, if I could just wrap this up, you don't remember what directions, criticism, suggestions, helpful comment or what you gave Mr. Williams after this; correct?

A. Yeah, that's absolutely correct.

Q. Thank you.

A. When you're under oath, you don't guess.

Q. I respect that.

Dr. Stejskal was appointed in late August, August 29. Does that sound right?

A. Again, I have to rely on the record, not my memory of six years ago.

Q. After Dr. Stejskal was appointed, you wrote a letter to Mr. Bell, correct?

A. To whom?

Q. To Mr. Bell.

A. Okay.

MR. CONNELL: Your Honor, before I forget, I move into evidence Petitioner's Exhibit 10, the memorandum.

THE COURT: It will be admitted.

(Petitioner Exhibit #10 was admitted into evidence). **[60]**

BY MR. CONNELL:

A. Mr. Connell, could I go back to answer your last question which I didn't seem to have an answer to?

Q. Regarding the appointment of Dr. Stejskal?

A. No, before that, when I told you I didn't want to guess since I was under oath.

Q. Sure.

A. Presumably, again, since I'm under oath, in response to the July 21 memo, certainly we moved forward in the proper direction to appointing Dr. Stejskal.

Q. So—

A. Whether I criticized Mr. Williams, whether I kept it to myself, but whatever, we made the next logical step, which was to get the 3:1 expert.

Q. Is your testimony in response to perceived difficulties with the July 21 memo, then you filed for Dr. Stejskal?

A. Sure.

Q. Isn't it actually true, sir, that you had filed for appointment of Dr. Stejskal on June 28, almost a month before the July 21 memo?

A. That, I don't recall.

Q. So actually you don't know whether in response to the memo you moved for Dr. Stejskal's appointment.

A. I know we proceeded with him. **[61]**

MR. CONNELL: Your Honor, I'd ask that this document, September 8, 2000, letter, be marked as Petitioner's 11, I believe, for identification.

THE COURT: Yes, sir.

(Petitioner Exhibit #11 was marked for identification).

BY MR. CONNELL:

Q. Mr. Fischel, do you have a copy of that in front of you?

A. September 8?

Q. Yes, sir.

A. Yes.

Q. Do you need a moment to read it?

A. Please. All right, I've read it.

Q. All right, sir. Would you please read for the Court the last paragraph?

A. The last paragraph on the second page?

Q. Yes, sir.

A. "Finally, do not" not is emphasized with an underline, the word not, "take our preparation for the penalty phase of the trial as any suggestion that Mark and I have lost faith in the guilt/innocence portion of the trial. You must prepare for all possible results as to innocence or guilt. If we do not

start now, we will" probably—"we will never be properly prepared for **[62]** trial."

Q. At the time you wrote that, you believed that. You didn't lie to Mr. Bell, did you?

A. No.

Q. Of course not.

THE COURT: Counsel, let me interrupt you. We're going to take a 15-minute recess at this time.

(Recess at 10:45 a.m. until 11:00 a.m.)

You may proceed.

MR. CONNELL: Your Honor, at this time, I move the admission of Petitioner's 11.

THE COURT: It will be admitted.

(Petitioner Exhibit #11 was admitted into evidence).

BY MR. CONNELL:

Q. Mr. Fischel, I'd like to move away from the chronology and talk about the division of labor a little bit.

You testified initially, with Mr. Snook, there was no formal division of labor; correct?

A. Correct.

Q. He, however, took responsibility for mitigation phase because he had been in contact with Ms. Deans; correct?

A. He had been in contact with her. Physically, his **[63]** office was near hers, that sort of thing.

Q. So before May of 2000, if there was any mitigation investigation being done, it wasn't you who was doing it. It was Mr. Snook or Ms. Deans or something on their end.

A. It was not me, to put it in the affirmative—I guess that's negative, but it wasn't me.

Q. When you were allocating tasks with Mr. Williams, it was not your task to go out and do mitigation investigations or mitigation interviews, correct?

A. In general, no, other than what I testified to previously that I undertook to do through the Jamaican consulate.

Q. In the division of labor, it was your task because you had some contacts there to go through the Jamaican embassy to try to retain documents; correct?

A. Correct.

Q. Over the course of the entire investigation, it was not you who did any of the mitigation interviews; correct?

A. Correct.

Q. You told us you did not—you already told us you did not meet with Stejskal; correct?

A. That is correct.

Q. And by all that, I don't mean to imply you didn't **[64]** do any interviews. You interviewed plenty of witnesses, correct? They were just all on the guilt and innocence side.

A. That's correct. Excuse me. You said all of them? Say that again.

Q. Excuse me. I'll rephrase my question.

We've already established that you did not perform mitigation interviews; is that correct?

A. That's correct.

Q. The interviews that you performed were related to guilt and innocence, correct?

A. Yeah. Some of them overlapped, though. Some were the same witnesses. I can't tell you that I didn't pick up on some of the same information as Mr. Williams so that when he and I would have our meetings, some of it cross-referenced. But my goal in speaking to those cross-over witnesses wouldn't start out for that purpose. But I would then end up speaking to some of those people. Again, if you're talking about what hat was I wearing, it was the guilt/innocence hat. But I would end up getting some of the same information.

Q. I'd like to talk now about your testimony that you had relied on Dr. Stejskal for the bulk of the mitigation investigation.

THE COURT: Let me ask you about Dr. **[65]** Stejskal. You said you never met with him? Was that your testimony?

THE WITNESS: I don't recall that I met with him in preparation for this case. I believe Mr. Williams met with him exclusively.

THE COURT: That is confirmed by his letter to both of you in which he says "by the end of my meeting with Mr. Williams."

THE WITNESS: Yes, sir. I think Mr. Williams—I'm pretty certain Mr. Williams reported to me that Mr. Williams went down to Charlottesville and it was Dr. Stejskal, his—the fellow or woman who was a Fellow at the university and then one or more others on their team at the institute. Mr. Williams will testify to exactly who he met with.

BY MR. CONNELL:

Q. And you've told us that in Virginia, you don't get to pick your 3:1 expert, correct?

A. Some judges are more flexible, give you more latitude, but the system doesn't, on paper, call for you to pick your own.

Q. So when you were approaching Mr.—Dr. Stejskal, you didn't rely on any website of the Institute for Law and Public Policy and Psychiatry, did you?

A. No. Back then, I don't know that we really had **[66]** too many websites. I think that's cutting edge now.

Q. I'd like to ask you—I'm going to ask you the principle, rather than asking you specific line by line of what happened in the transcript. But it is your position that we established earlier that a mitigation specialist is not the same as a 3:1 expert; correct?

A. 3 colon—

Q. —1 expert.

A. That's correct, they're not the same. They're not qualified to do the same. However, a 3:1 expert could do what a mitigation specialist does, but a mitigation specialist can't do what a 3:1 expert does.

Q. It has been your practice in your cases to ask for, to move the Court for a mitigation specialist and a 3:1 expert separately; correct?

A. Three out of five cases, yes. Two cases I didn't, I only used a 3:1 expert.

Q. Do you count this as one of those? Do you count Bell as one of the ones that you only used a 3:1 expert?

A. That's correct.

Q. Do you recall that in this case, the prosecutor at the hearing on the motion for mitigation specialist, it was the prosecutor who argued, no, your

3:1 expert can go do all your mitigation investigation? Do you remember the prosecutor arguing that? **[67]**

A. No.

Q. Do you remember Mr. Snook refuting that?

A. No, but if the record says it, obviously, it was said.

Q. Sir, I'm showing you and I'm going to put on the ELMO and see if we can make that work—can you read that?

A. Sure.

Q. I'm showing you what in the joint appendix was page 556.

A. No, I see 555.

Q. Do you see the printed one?

555, you're exactly right. Do you see the paragraph that says, "Mr. Thompson says"?

A. Line 15?

Q. Yes, sir.

A. Okay.

Q. Would you read that paragraph?

A. "Mr. Thompson says, well, why don't we get the expert report first and then we can develop all of this other stuff? You know, when I lecture at capital defense seminars, I suggest to people that they do it that way—that way is ineffective assistance of counsel. And the reason that it is ineffective assistance of counsel is that experts work with information that they are **[68]** given. And if that produces a report based on incomplete information, inadequate information, inaccurate information, that"—

Q. I'm going to change the page for you.

MS. BALDWIN: Will counsel identify who is speaking in the transcript?

MR. CONNELL: Mr. Snook.

THE WITNESS: "That report becomes something that they are cross-examinable on even if they come up with a different report later on."

BY MR. CONNELL:

Q. Would you finish by reading the next paragraph?

A. So, if I get them to give a report and then we sit there and say, gee, I wish I would have known, we could have gotten you more information about this, this, and this, and then come out with a different report, I have now a hand strung expert who is going to have to stand by and defend a decision that may be inconsistent. That is why it is ineffective assistance of counsel in my view to do what Mr. Thompson would have me do and I'm not going to do that, Judge."

Q. Thank you.

Do you recall that at that hearing, the judge actually found that it was routine in that court to have a separate investigator who provided information to the **[69]** 3:1 expert? Do you recall that?

A. Let's use our terms precisely. You're saying an investigator or a mitigation specialist?

Q. An investigator whose job was to investigate mitigation rather than facts. I call that a mitigation specialist, but not everyone does.

A. Now you have me confused.

Q. Let me just show you. I'm showing you what's in the appendix as JA 560. It's the same hearing

and this is Judge Hupp speaking. Would you please read the bottom paragraph for us?

A. I assume this is Judge Hupp speaking?

Q. That's correct.

A. 560, at line 14, is that correct?

Q. Yes, sir.

A. "I would also point out that the two capital murder cases that I have been involved in as a judge, one in Warren County, which has been concluded, and one now pending in Shenandoah County, we have used the services of people—don't call themselves mitigation experts, but people that have brought together the social history and background of the defendant and done that type of investigation to assist the psychologist so the psychologist when we get to that point or if we get to that point does not have to do it himself." **[70]**

Q. The Court then granted your request for a mitigation specialist, correct?

A. Correct.

Q. And later at the motion for a continuance on May 12, the Court explained that they did not appoint any particular mitigation specialist. They authorized a budget and it was up to you to make your decision about how to spend that budget; correct?

A. That's correct and that's traditionally the way it's done.

Q. Although you weren't the person making the argument in this case, you have made the same argument there needs to be a separate person who gathers the information from the 3:1 expert in some of your other cases at least; correct?

A. Correct.

Q. So for example, you represented a man, Christopher George Steel, in Faquier County, a couple years ago; correct?

A. That's correct.

Q. And you argued to the Court—you, in fact, argued the Bell case as authority to that Court for why you should get a mitigation specialist separate from a 3:1 expert; correct?

A. Correct. **[71]**

Q. And at that point, you argued that it was necessary for the effective assistance of counsel to have a mitigation investigator separate from the 3:1 expert to gather the data before presenting it to the 3:1 expert; correct?

A. I'll have to say probably, without the transcript in front of me, but I would assume so.

Q. When you moved—you moved for a mitigation specialist in the Matthews case in Faquier County in 1996; correct?

A. Mitigation specialist?

Q. Yes, sir.

A. I think so.

Q. And you moved for a—and you received a mitigation specialist as long ago as 1996, correct?

A. Yes.

Q. In fact, in that Steele case, you argued the Matthews case, along with the Bell case and two others as authority for why the Court should give you a mitigation specialist separate from the 3:1 expert; correct?

A. I think so. Again, memory, but I'll go with you on the record.

Q. You moved for and received a mitigation specialist separate from a 3:1 expert in the White case **[72]** in Loudoun County; correct?

A. No recall of it in White.

Q. In the Steele case, did you use White as authority—you cited the White case to the Court for authority as to why you should get a mitigation specialist separate from the 3:1 expert?

A. I don't recall.

Q. Do you recall the Bean case in Culpeper County?

A. Sure, that was nolle prossed almost immediately and went to the federal system.

Q. You also cited that case as authority for moving for and receiving a mitigation specialist separate from a 3:1 expert; correct?

A. I don't recall that at all. That happened so quickly, I don't recall having enough time to file any major motions.

Q. You yourself are fully versed in the distinction between mitigation specialist and a 3:1 expert.

A. Yes.

Q. There's no way that Dr. Stejskal could trick you or mislead you to believe that he viewed himself as primarily a mitigation specialist; correct?

A. Trick; no, no.

Q. And do you know, as from your many cases, from a defense standpoint at least, there are strategic reasons **[73]** to prefer a mitigation specialist to do a mitigation investigation as opposed to a 3:1 expert to do a mitigation investigation, correct?

A. Yes.

Q. For example, it's cheaper. You can get more hours in the budget with a mitigation specialist, correct?

A. Correct.

Q. There's no waiver of attorney/client privilege with a mitigation specialist, correct?

A. Correct.

Q. There's no requirement to turn over a report with a mitigation specialist, correct?

A. Correct.

Q. And if a mitigation specialist conducts the investigation, you don't have to turn over to the prosecution the bad facts that you may discover, correct?

A. The bad—

Q. The bad facts, the facts that you don't like.

A. Right.

Q. Now, am I correct—we know you didn't meet with Dr. Stejskal, but am I correct that you did not supervise his investigation in any way?

A. Directly, no. **[74]**

Q. You didn't tell him who to interview, who not to interview, anything like that?

A. Correct.

Q. When, approximately, did you receive Dr. Stejskal's report? Was it just a week before trial or so?

A. I don't recall. You'd have to show me the report itself and the date on it.

Q. If I represent to you it's dated January 7, 2001, does that sound about right?

A. I'll accept your representation.

Q. When you received that report, I'm sure you read it.

A. Of course.

Q. And were you surprised to learn that Stejskal himself, not his associate, but Stejskal himself had never interviewed a single witness other than Bell? Was that surprising to you?

A. That was surprising.

Q. And did it surprise you to learn that his associate, Dr. Beck, had only interviewed six people?

A. Yes.

Q. You were not surprised to learn that Dr. Beck had interviewed a witness in Jamaica, were you, because you had heard about that already. **[75]**

A. Right.

Q. Were you surprised that the report identified over 15 witnesses that they did not interview, Stejskal or Beck?

A. Well, when you say surprised, by the time I got to that part, I was no longer getting surprised.

Q. You didn't consider that report to be a thorough mitigation specialist investigation, did you?

A. It provided me with enough social history in terms of Mr. Bell's general upbringing. The similar lack of ability to document school, military, which we knew didn't apply, and things of that nature and his mental health issues, that even though it might not be ideal, it gave me the sense that we had what we were going to get from a 3:1, even if a complete mitigation report had been provided to Stejskal. He wasn't going to be able to provide us anything more useful.

Q. But you didn't feel that he himself had developed a full—a psychosocial history report of the level you've come to expect from mitigation specialists that you've worked with.

A. From mitigation specialists; I didn't really analyze it that way.

Q. When you saw the report, were you surprised neither Dr. Stejskal nor Dr. Beck had interviewed a **[76]** single co-worker?

A. Well, no, because Eddie told us he was unemployed.

Q. For his whole life, he told you that?

A. He gave us a job history in Winchester. That's how Mr. Williams reported it to me.

Again, you're asking the wrong one of the two of us about that information. So when you tell me surprised, you're asking the wrong member of the defense team.

Q. So the reason why it did not surprise you that they did not interview a single co-worker is that you believed the whole time Mr. Bell had been in the United States, he had been unemployed; is that correct?

A. I was not aware of a job history.

Q. So you weren't aware there were any co-workers. That's what you're telling us, as I understand it.

A. Correct.

Q. Were you surprised to learn that no one had interviewed Mr. Bell's wife, Barbara?

A. I keep having trouble with your word, surprised.

Q. Let me rephrase because I don't want to use a word that causes you trouble. When you read the report, was it below your expectations that the—that no one had interviewed Mr. Bell's wife? [77]

A. That stood out.

Q. Is that a phrasing that you're more comfortable with?

A. Yes.

Q. When you read the report, was it below your expectations that no one had investigated anything about Mr. Bell's criminal record?

A. In Jamaica.

Q. We'll start with in Jamaican.

A. Well, not at that point because I hadn't been able to secure the same thing through the consulate.

Q. And—

A. So I was satisfied that it was unavailable because I figured if the government of Jamaica couldn't supply it, how could Dr. Stejskal.

Q. You were satisfied in January when you received the report, on that point?

A. Yeah, because I couldn't get it from the government of Jamaica about it's own citizen from it's own government authority in Jamaica.

Q. Well, in fact, didn't the prosecutor send you a criminal record copy of Jamaica on December 18 of 2000?

A. But I'm saying for Dr. Stejskal to not have it in his report, it didn't bother me that it wasn't there, since I had it. [78]

Q. Did it surprise you since you had it—I'm sorry. Was it below your expectations that no one

had investigated the allegation of assault with injury in Jamaica that you had documentation of?

A. That was below my expectation.

Q. Was it below your expectations that no one had investigated the allegations of domestic violence against partners of Mr. Bell?

A. Partners? Be specific because—

Q. Tracy Nicholson, Dawn Jones, Barbara Williams and Billy Joe Swartz.

A. My answer is going to be you need to talk to Mr. Williams about that because he undertook certain investigations himself.

Q. I know, but I'm asking when you read the report, was it below your expectations that no one had investigated any of those claims of domestic violence to see if they were true?

A. I think at that point, and I'm only supposing because I did not discuss this with Dr. Stejskal, I think that he knew that his report was subject to disclosure and he did not choose to investigate those. Now, whether that was professional on his part or not, that's a question for his examination and cross-examination, but he's apparently done. **[79]**

Q. That's an example of a reason why typically you pursue those sorts of investigations through a mitigation specialist rather than a 3:1 expert because you have to turn over the 3:1 expert report; correct?

A. But if you look to what we were doing, you'll find out that we did it through our own efforts.

Q. Sir—

THE COURT: Let me interrupt you.

As I understand, you correct me if I'm wrong, when you got into the case and after Mr. Williams replaced Mr. Snook, you decided that you would not continue with Ms. Deans. You said, you, in effect, fired her because you had some concerns about her effectiveness. And at that point, you determined that you would not obtain any other investigatory assistance other than what may have occurred by the 3:1 expert; is that right?

THE WITNESS: Yes, sir.

THE COURT: The basis of that decision was that Mr. Williams was, in essence, going to do that investigation.

THE WITNESS: Much of it, yes, sir. I'll just say yes, sir. I won't qualify it.

THE COURT: He was going to do that part of it, investigate possible mitigation witnesses and of **[80]** course, it was your understanding that he started engaging in that and six months or so before trial, this July 21, 2000 memo tells you about the interviews that he had conducted and so on. So am I accurate about everything I've said about what your preparation strategy was?

THE WITNESS: Some of it, leading up to. He'll have a lot more to say in that regard, obviously.

THE COURT: I understand, but from your point of view, that's what it was.

THE WITNESS: That's the trend.

THE COURT: There wasn't any other person out there that you were relying on—

THE WITNESS: No, sir.

THE COURT: —to do investigation.

Thank you.

BY MR. CONNELL:

Q. Mr. Fischel, I'd like to move on to your statements about tension between guilt phase and penalty phase.

A. The what?

Q. About the tension between a guilt phase presentation and a penalty phase presentation. Your testimony on direct was that when you fight a case tooth and nail or with great vigor in the guilt and innocence [81] phase, that it puts you in a difficult posture with the jury because you no longer have credibility with them. Is that correct? Is that your testimony?

A. Yes, sir.

Q. So it is your opinion that if you fight in the guilt phase on an innocence claim, that you really can't put on mitigation, correct, because you don't have credibility with the jury anymore?

A. Well, if I was to say it was my opinion, I would be putting myself in a very lofty place where I don't deserve to be. I would be on a lot of people's coattails who are far more distinguished than I would ever imagine I could reach because I'm telling you what some very, very distinguished trial lawyers and professors of this profession have taught dozens of us.

Q. Let's set that aside for just a moment.

A. That's the answer to the question, sir.

Q. But you did not answer the question of whether or not that is your opinion. Is that your opinion? Is that a shared opinion?

A. I share that opinion with those people.

THE COURT: Let me interrupt. I'm sorry.

When you say that you agree that if you fight hard on the guilt/innocence phase that you don't have mitigation credibility with the jury, I mean, are **[82]** you saying you just don't do anything or you do what you did in this case, which is essentially say, life is worse than death for this person?

THE WITNESS: The totality of the answer, Your Honor, is that you make a strategic decision on how you approach the guilt phase based in part on the facts of the case, in part upon what your client's wishes and instructions are, and of course, informing the client about what I've just said and educating the client to what I've just said. And then you accept the fact that the mitigation phase will be most difficult, very uphill. You have to, according to all the experts that I've been educated by, as a starting point, divide counsel immediately so the attorney who put on the guilt phase almost vanishes from that table. You kind of hide behind the books if you can and make believe you're not even in the courtroom. The jury doesn't want to see him or her and a different attorney who's had a very di minimus role in the guilt phase in the opening, in the jury selection, now takes over and tries to put at least a gray hat, if not a white hat on, and present as good a mitigation case as you might be able to develop. You employ what strategy you can.

THE COURT: I think that's different than the question that was asked you maybe. **[83]**

THE WITNESS: I think that is the answer though because that is the answer—the question as I recall it is the tension between guilt and innocence versus mitigation and there is that strong a tension.

THE COURT: Understandable, and I agree. I guess what I'm trying to find out is, is it your view that having fought and lost the guilt phase that it is futile to try to humanize the defendant?

THE WITNESS: Conceptually, no. As a theory, no. But some defendants, there's a practical reality and some victims help to create that practical reality.

THE COURT: I understand that.

So you're not saying—I mean, are you saying that if you had appropriate evidence that would help to mitigate, that is, to humanize the defendant, to make the defendant a person that the jury would not wish to put to death, that you would put it on, even though you had fought hard at the guilt phase and lost?

THE WITNESS: To be very direct and to get right to the heart of this case, if I thought that we had evidence that would have humanized this gentleman, we would have put it on, but I didn't think that we had found it.

BY MR. CONNELL: [84]

Q. I just want to explore that because you're right, that is very much at the heart of one segment of this case.

What you're saying is, if you had had evidence that you believed would humanize the defendant, then you would have put it on, strategic considerations about the environment, about the press, about the jury composition notwithstanding; correct?

A. When you say notwithstanding, that again is the reality. Remember what I said, sir. What I said was that humanizing a defendant in the face of the

crime that he—the facts that he was convicted of, the crime that he was convicted of, versus the person, the victim he was convicted of harming.

Q. I want to talk about that and give you an opportunity—

A. Let me finish because I want to answer your question. I haven't done that yet. I've only given you a preamble. What we have here and again, I have to say this with Mr. Bell sitting in the courtroom and I don't mean to insult him, but I'm going to give you what we feel is the evidence that we would have presented and/or could have presented that the Commonwealth was going to then shove down our throats.

Q. I'll briefly summarize that because we can move **[85]** it quickly.

MS. BALDWIN: Your Honor, he's interrupting the witness. The witness is answering the question.

THE COURT: I'll give everybody a chance to say what they want.

Go ahead, sir. Why don't you summarize it and then the witness can—

BY MR. CONNELL:

Q. The summary is, if you had put on evidence about his children, there would have been contrary evidence about Mrs. Timbrook's fatherless son. If you had put on evidence that he had a good relationship with his wife, with his girlfriend, with his children, that there would have been evidence of domestic violence. And if you had put on evidence that he had—does that summarize it? I think those are the two.

A. Oh, no, it would have gone further than that. There would have been the issue of that night, he

had come back from Charlestown and the inference of a drug-dealing Jamaican. Again, I say that not with any prejudice on my part, but this is where the Commonwealth was going to come from. Again, going to the unadjudicated bad acts, that there had been a physical assault.

Q. On Billy Joe Swartz. **[86]**

A. On Billy Joe Swartz. That was a disgusting act. You know what it is. I don't feel like testifying to it. It's in the record. That there had been that event in West Virginia with the police officers where there was that event up there and it would have gone on and on and on and everything that we would have tried to put on to humanize Mr. Bell would have shown somebody who was simply socially maladaptive and then they would have reemphasized the motive in terms of having prior incidents with Sgt. Timbrook and then they would have gone on to reemphasize the fact that upon being convicted of this—being caught with a gun in his possession or drugs in his possession or just a probation violation kind of thing—boom—being deported. All of this would have just gone on and on and built up to the point that any effort on our part was going to snowball and become so counter-productive that we thought minimization as a strategic decision was a better route. If that's wrong, that's wrong. But we thought it was right at the time.

Q. I want to make sure I understand your position. You're saying those reasons you just stated are the reasons you did not put on evidence, not because—

A. There also wasn't evidence.

Q. But the reason was not that it would insult the [87] jury to put on a penalty phase defense after fighting on guilt and innocence.

A. I didn't say that was not a reason. That was also a reason. I gave you a list.

THE COURT: Let me be candid with you about the evidence that I've heard.

THE WITNESS: Yes, sir.

THE COURT: Just in one instance. I've heard testimony from Mr. Bell's wife in Jamaica, Barbara Williams. She was never interviewed by you or Mr. Williams. Very nice person. Testified. She's a teacher in Jamaica. Very respectful appearing. Testified that Mr. Bell was a loving, decent and hardworking husband; that he did leave her and come to the United States; that he was a good father. They have a daughter that he writes to and who loves him and she was never contacted.

Now, what would have been the problem with presenting her—she also testified that she was very able to come to the United States and would have come on Visa, passport.

What would have been the reason not to have called such a person, had you known what she was going to say?

THE WITNESS: I'm not going to attempt to [88] blow smoke at the Court. I don't have an answer to that because I was not fully informed of her presence, involvement or anything because of that situation. So I'm not going to even attempt to answer you because I don't have an answer.

THE COURT: Thank you.

THE WITNESS: I'm not going to mislead you in any way.

BY MR. CONNELL:

Q. Mr. Fischel, I'll move on to what you testified about your reaction when you lost the change of venue motion.

A. Say that again, sir.

Q. I want to move on to your reaction, what you were telling the judge during your colloquy earlier about when you lost the change of venue motion.

If I understood your testimony, when you lost the change of venue motion, given the environment in Winchester at that time, you weren't sure there was any mitigation strategy that would do anything.

A. That is a true statement by you of my reaction and if I could state it more explicitly, I told Mr. Williams in the lobby—there was a break and then we went back in for something else. I looked at him and I said, if Eddie is convicted, he's a dead man walking. **[89]** You know what that means in death penalty jargon. I just absolutely knew at that point that if we lost on guilt or innocence that a jury would vote for him to be executed.

Q. And that occurred, that motion was—the motion to change venue was denied April 18, 2000; correct?

A. I'll accept that date. I don't recall it.

Q. But it was before Mr. Williams was even involved in the case, correct?

A. I must have said it to Mr. Snook, then. I'm sorry. But I said it to co-counsel.

Q. On that date, April 18, 2000, the Court ruled if we—we're going to wait and see what happens in the voir dire. If we can't empanel a jury in Winchester, we're going to move the case to Staunton; correct?

A. Yes.

Q. After the voir dire, you didn't move for a change of venue at that point, correct?

A. I don't recall either way.

Q. You talked about the environment in Winchester at that time and the news coverage and the outpouring of support for the Timbrook family; correct?

A. Yes.

Q. And that news coverage was all about the terrible loss of the Timbrook family, correct? **[90]**

A. Well, yeah. It covered so many different aspects of the case, but that was a main theme.

Q. There was no main theme of "Mr. Bell is actually a human being with loving relationships and who might have a perspective of his own;" correct? That was not one of the themes of the newspaper.

A. No, I don't remember anything resembling that.

Q. There was nothing in the press that presented any sort of human side to Bell, correct?

A. Not that I recall.

Q. It was all murderer, drug dealer, et cetera, correct?

A. I don't ever recall the newspaper calling him a drug dealer, but they may have.

Q. And you testified that in that community, there was a stereotype of Jamaicans, correct?

A. Yeah, certainly about young Jamaicans, male Jamaicans.

Q. And that stereotype was that they were lazy and unemployed?

A. Yes.

Q. That they—

A. Let's take it the other way. If they were unemployed, they were involved in drug activity.

Q. They were not employed in the formal economy, **[91]** it's fair to say.

A. Right.

Q. That they were frequently felons?

A. Yes.

Q. Generally disreputable and not participating in legal life.

A. Well, the main stereotype, you may be taking it the wrong way or stating it the wrong way. The two things that added up to the negative illegal activity was if they were unemployed and if they said they were going to Charlestown, it meant that then they were involved in drugs. But if they worked and weren't involved in going to Charlestown on a regular basis, then I'm not sure that that same stereotype would apply to an individual.

Q. So it's possible—in your perception of what the community thinking was, it was possible to move a person out of the stereotype of unemployed lazy drug dealer—some Jamaicans were not swept up in that stereotype; correct?

A. Yeah.

Q. Was there any investigation that either you did not perform or that, to your knowledge, Mr. Williams did not perform because you were afraid of contradicting your guilt phase defense? **[92]**

A. Because we were—

Q. Because you were afraid of contradicting or revealing facts that contradicted your guilt phase defense.

A. No, not that I know of.

Q. Did you consider the possibility that a mitigation investigation might support the guilt phase defense?

A. No, no. We had a very substantial factual challenge to the guilt phase that went right down to questions of why were there three samples of DNA on the firearm—Mr. Bell's, the decedent's and an unknown third party; questions of infrared signature on the ground of an unknown party during the time that Fairfax helicopter was overhead; questions of the break in the so-called police containment area. It just went on and on and on and on to the point that the spectators in the courtroom who watched the trial throughout expressed extreme concern at the closing of the case that waiting for the jury to come back on the guilt phase that we had succeeded. And I'm not saying that's what you rest your laurels on, but the reality is that we weren't worried—you worry whether you're going to win or lose a case on a guilt phase, but we within the degree that a trial attorney can be comfortable. Never confident, but **[93]** comfortable. We had prepared a guilt or innocence case as best one could.

MS. BALDWIN: I'll point out, Your Honor, to my knowledge, there's no claim in the case that has to do with investigation of guilt phase. I'm not sure—

THE COURT: No remaining claim at this point. I understand.

MR. CONNELL: I'm sorry.

THE COURT: Can we move along?

MR. CONNELL: I want to make one point because there's very much a convergence between mitigation and investigation. We've heard facts from the stand that would have helped in a guilt phase investigation.

THE COURT: He's answered the question as best he can.

BY MR. CONNELL:

Q. It was a circumstantial case from the Commonwealth, correct?

A. I think so.

Q. Your strategy was to develop inconsistencies in the case.

MS. BALDWIN: I'm going to object. That's not what the hearing is about. There's no claim on the guilt phase. We're here to look at investigation of **[94]** mitigation.

MR. CONNELL: Your Honor, what I understand part of the Attorney General's defense to be is that because they focussed on the guilt phase, they didn't need to do any additional mitigation investigation and what I'm saying is there is the possibility—

THE COURT: I don't believe the Attorney General has argued that. It would be a loser of an argument if it was made. I mean, I think the position of the respondent in this case is there has not been a constitutionally deficient mitigation investigation.

I mean, if you'll tell me or ask the witness what your point is rather than—let's kind of cut to the chase here. What are the details? Ask him something I can understand.

BY MR. CONNELL:

Q. Yes, sir.

Part of the Commonwealth's circumstantial evidence case was the motive that Mr. Bell hated police officers in general and Sgt. Timbrook in particular; correct?

A. Yes.

Q. It might—you might have considered, if you had it, presenting evidence that Mr. Bell did not hate police officers in general. **[95]**

A. Is that a question?

THE COURT: Is the question, if you knew of evidence that you could—admissible evidence that you could present that Mr. Bell did not hate police officers or had some fondness for police officers, would you have attempted to introduce that in your defense?

BY MR. CONNELL:

Q. Or would you have considered it?

A. Certainly would have considered it.

Q. Another part of the motive case for the Commonwealth was that Mr. Bell was a flashy drug dealer. They introduced his jewelry and all sorts of things; correct?

A. I don't remember that being in evidence.

Q. You don't recall all the jewelry being in evidence?

A. No.

Q. It's a matter of record. I'll move on from that.

A. Show it to me and I'll recall it, obviously. I just don't happen to recall that one feature.

Q. Part of the Commonwealth's case was that Mr. Bell had been found hiding very near the scene of the crime; correct?

A. Yes.

Q. And you in your defense, part of your defense was [96] developing alternative explanations for why he was hiding there other than he had just shot officer Timbrook.

MS. BALDWIN: I object. This is going to their claim about residual doubt. It's completely inadmissible and not the claim this Court ordered the hearing on.

MR. CONNELL: This is fundamental at it's basis. It is an investigation claim.

THE COURT: I think I have limited it to the case on mitigation. I don't know that there's any, frankly, any helpful evidence you can obtain from counsel in this regard anyway.

I'm going to sustain the state's objection and ask you to move on to another topic.

BY MR. CONNELL:

Q. You gave us some reasons on your direct examination, in response to the question, judge's question about how did all that translate into a decision to present no mitigation evidence. Do you remember that colloquy?

A. Yes.

Q. One of the things you talked about was Mr. Bell having multiple children by multiple partners, correct?

A. Correct. [97]

Q. You said you were not concerned with the legal status of them, correct?

A. Yeah, not overly. It wasn't, as I say, wasn't a great big prudish thing, the fact he had multiple partners.

Q. The thing that concerned you was he wasn't supporting those children, correct? Now, did you interview Ms. Williams to find out if Mr. Bell was supporting his child in Jamaica?

THE COURT: Aren't we established that he didn't interview Ms. Williams?

MR. CONNELL: I'll go more broadly.

BY MR. CONNELL:

Q. Did you conduct an investigation or your team conduct an investigation to find out whether—to develop evidence that, in fact, Mr. Bell did support his children, all five of them?

A. I'm going to defer to Mr. Williams.

THE COURT: It was your impression, as I understand it, he did not support his children; is that correct?

THE WITNESS: My impression was, Mr. Williams reported to me that Mr. Bell would give them gifts from time to time and I don't know what that word means. But it was not what you would standardly [98] understand to be child support in the sense of cash every week.

BY MR. CONNELL:

Q. Did you do an investigation to determine whether there was a child support order in place?

A. Our understanding is there was not.

Q. The next thing that you talked about was the prior bad acts. You've said a couple times the list of prior bad acts. Principle among that list is the assault on Billy Joe Swartz, correct?

A. I'm not going to characterize it as being principle, but it certainly was there.

Q. There were two incidents of domestic violence which were described in the prior bad acts. One of those was the attack on Billy Joe Swartz and on Tracy Nicholson at the same time and the other was the incident with the gun with Dawn Jones; correct?

A. Correct.

Q. So when we talk about domestic violence, those are the two prior bad acts we're talking about; correct?

A. Correct.

Q. Did you or Mr. Williams conduct an investigation to determine whether or not there was evidence that would rebut the claims there had been domestic violence or to minimize it? **[99]**

A. Mr. Williams did.

Q. The fourth element that you gave was that Mr. Bell had a wonderful sister you were relying on as your evidence from Jamaica; correct?

A. Correct.

Q. Now, the first time that anyone on the defense team other than Dr. Stejskal—either you or Mr. Williams had ever known anything about that woman, Nelly Hutchinson Walker, was on December 14, 2000, when Dr. Stejskal and Dr. Beck told Mr. Williams about it; correct?

A. I can't answer that, one way or the other.

Q. Prior to December 14, 2000, did you personally have any information with respect to Nelly Hutchinson Walker?

A. I just answered that. I couldn't tell you anything about the lady in terms of anything about her other than I found out there was a good witness

in Jamaica and then at some point prior to trial, she passed away suddenly.

Q. Isn't it actually true, sir, that you found out on the same day, December 14, 2000, that she had died, the same day you actually found out of her existence?

A. I don't know that. I don't recall. It's too long ago for me to recall that with precision. **[100]**

Q. I'd like to talk a little bit more about the multiple families issue. You knew prior to trial because of open file discovery that INS Officer Deborah Todd would testify; correct?

A. That who?

Q. Deborah Todd, the INS officer?

A. Yes.

Q. You did know that. And you received documents related to the INS file. You received the whole INS file in open discovery, correct?

A. Yes, but sitting here, I don't recall what that whole file said.

Q. You knew the INS documents listed Mr. Bell's wife as his spouse, correct?

A. Correct.

Q. Ms. Todd, in fact, testified at the trial that Barbara Baugh, at that time, was Mr. Bell's spouse; correct?

A. I think—well, I wouldn't say correct. I'm sure she did, but I don't have independent recall sitting here.

Q. There was actually evidence admitted by the prosecution about Ms. Barbara Bell or Barbara Baugh; correct?

A. I have to agree with you, but again, it's **[101]** accepting your statement of what's in the record, but again, I don't have independent recollection.

Q. You testified prior to—excuse me. You testified—strike that. Prior to trial, you knew that Billy Joe Swartz was going to testify in aggravation; correct?

A. Yes.

Q. And you knew she was going to testify about this attack on her and on Tracy Nicholson, correct?

A. Yes.

Q. And you knew that Swartz would testify that she had had a sexual relationship with Bell, correct?

A. Yes.

Q. And Swartz did, in fact, testify that she had a sexual relationship with Mr. Bell, correct?

A. Correct.

Q. And Ms. Swartz did, in fact, testify about Tracy Nicholson, Bell's, as she called it, other girlfriend, correct?

A. Correct.

Q. And, in fact, the Commonwealth argued in the closing about Bell's other girlfriend, Tracy Nicholson, correct?

A. Yes.

Q. Ms. Swartz actually testified that Tracy had a **[102]** child with Mr. Bell and that she was pregnant again, correct?

A. Correct.

Q. So by the end of the trial, the jury had before it testimony about Mr. Bell's wife in Jamaica, his child in Jamaica and his relationship with Billy Joe

Swartz and his relationship with Tracy Nicholson; correct?

A. Correct.

Q. In fact, Dawn Jones testified for the prosecution as well, correct?

A. Correct.

Q. Now, is there any investigation that you or your team did not perform because you were afraid of evidence of domestic violence, any investigation?

A. Investigation?

Q. Yes.

A. No.

Q. Now, you've testified that you had consulted with Professor Groot. When you went down to consult with Professor Groot—and you also wrote him a letter, most of your discussion was about legal issues, correct?

A. I don't know how to answer that because I don't know how we subdivided that. I have to say that I probably talked to him about legal issues and—but at the same time, I know we talked mitigation. It's such an **[103]** important feature about what they do at the clearing house.

Q. Now, did you tell Professor Groot that you had money for a mitigation specialist, but you didn't intend to use it?

A. I doubt it.

Q. Did you tell him that you had money for an investigator, but you didn't intend to use that?

A. At the time we met with him, we were using one or had ostensibly hired one.

Q. You hired one, but he didn't do anything. He was a bust.

A. He supposedly was working for us, but was not coming through.

Q. Did you tell Professor Groot you intended only to interview half a dozen witnesses in mitigation investigation?

A. I doubt we talked to that detail.

Q. Did you tell Professor Groot you did not intend to investigate the aggravating factors at all? I'm sorry, you may have answered and I missed it.

A. I'm sorry?

Q. Did you answer?

A. I didn't answer. Ask the question again, please.

Q. Did you tell Professor Groot you did not intend **[104]** to investigate the aggregating factors at all?

MS. BALDWIN: That assumes facts not in evidence.

MR. CONNELL: It's one fair characterization.

THE COURT: Well, I'll overrule the objection.

THE WITNESS: That's something, again—

THE COURT: I'm sure you didn't tell Professor Groot, Professor Groot, we're not going to do any investigation about mitigation factors.

THE WITNESS: I just can't recall that kind of detail.

THE COURT: You think you may have told him that, you weren't planning on doing any mitigation investigation?

THE WITNESS: I can't imagine saying that to him.

BY MR. CONNELL:

Q. You didn't tell him we plan to put on only a seven-minute mitigation case?

A. I doubt seriously I would have said that.

Q. Did you tell him you intended to present evidence from Bell's sister that the crime had had a severe impact on her children? **[105]**

THE COURT: Let's get—your testimony is, you don't remember the detail of what you talked to Professor Groot about, is that correct?

THE WITNESS: I don't remember the details of the meeting. I don't remember how many times I talked to him on the telephone. I don't recall the date of the conference with him.

THE COURT: More importantly, you don't remember the details.

THE WITNESS: No.

BY MR. CONNELL:

Q. I'd like to talk to you about the victim outreach. Who in the Timbrook family did you contact?

A. The reality is, I contacted Sgt. Timbrook's wife, mother and father, at a hearing in what I call a small courtroom, very early in the case, after Mr. Williams was appointed to the case. I guess Mr. Thompson—I told Mr. Thompson I'd like to say a few words to them and he went back and talked to the chief who was sitting with them. He asked them if it would be okay if I spoke with them. As you can imagine, they were very reluctant. They saw Mr. Bell as the devil incarnate and I was not far removed from that. But they were willing. And I expressed my condolences and I told them that I was wanting to reassure them in the short time I'd been **[106]** involved with the case that Sgt. Timbrook

appeared to be a fine young man and that his reputation was such and his actions that night were such that he wasn't going to be on trial. This wasn't a case where his actions were at issue and that they could rest assured that despite the fact I had a job to do and I was going to fight vigorously for Mr. Bell, that it wasn't going to be a trial where Sgt. Timbrook was going to be put on trial. And they felt somewhat assured that I was being sincere, although they still didn't trust me right then and there, which is very understandable.

As time went on, I think in descending order, Mr. Timbrook and I developed the best relationship and his wife, Sgt. Timbrook's mother, and I, developed the next best relationship, and Kelly, the widow, I think, probably looked at me one notch above neutral because I was still representing the person she saw as the enemy.

But I think probably, I'm guessing, that there were positive comments from her in-laws and throughout the whole case, I proved myself in the end as to that promise about not maligning Sgt. Timbrook. I think, if I had to guess, to this day, she probably tolerates me. But I'm sure I'm not—she's not my biggest fan.

Let me continue. This is very important because as you saw in that affidavit, and it came ironically, **[107]** Eastern Mennonite University, the college right here, teaches us about victim reconciliation and teaches us in our capital work that there is some possibility, sometimes, in some cases, that there are some victims' families that can possibly decide that they're not interested or they don't want to have the death penalty occur in a case where they lost a loved

one and that it really comes down to defense counsel to reach out and test those waters.

I've never said that to the Timbrooks. I've never—I hope they don't think that's the only reason that I met with them that day and talked to them that day. It hardly was. I did express my condolences to them and migrate concerns for them as people who lost a loved one. And it was very obvious in very short order that they wanted to see what they perceived as justice happen in the case. I never, ever, ever would think otherwise of them. They saw it the way they saw it and they see it the way they see it.

But I had, throughout the case, spoke primarily to Mr. Timbrook, Richard Timbrook, and as I say, it never developed in such a way that there was any opportunity, if you will, to have any other conversation than what I call the pleasantries of the day.

Ironically, Mr. Timbrook had the opportunity to **[108]** talk to one of Fauquier County's deputies earlier this year and very nice experience for one of those deputies to say to me, hey, I have regards to you from Rick Timbrook's father and he sends his regards and he was asking how you're doing. Nice to know somebody on the other side of a case like this said nice things, even though they are so maligned opposite to the situation.

But the flip side is that doesn't help our situation today. We still have this case. We still have the decisions that have to be made.

Q. You would agree victim outreach is not a strategy to develop mitigation evidence. It's a strategy to get a better plea deal; is that fair?

A. I think it can be both.

Q. Do you believe under Virginia law, a witness can testify that they don't think someone should get the death penalty?

A. No, I think as a form of mitigation, it can be used to ask the Commonwealth to take the death penalty off the table and just go for capital life as the penalty at trial.

Q. Fair enough.

A. I believe that's a form of mitigation counsel should pursue all the way to the end, if possible.

Q. You testified on direct examination that your **[109]** strategy of putting on prison life evidence was disapproved at the last minute. You were on the verge of putting on such evidence; correct?

A. Yeah. I can't tell you the date it was disapproved, but we were trying to do it.

Q. Would it surprise you to learn the final denial for the reconsideration of the motion to put on prison life evidence occurred on October 30, 2000?

A. I don't recall the date.

Q. I'd like to ask you some questions about what you testified about the feared evidence of Mrs. Timbrook's fatherless child; okay?

A. The what?

Q. Mrs. Timbrook's child who was growing up without a father.

A. You said something before that. What?

Q. I'd like to ask you some questions about that. Is there any investigation that you did not perform because you were afraid of a comparison with Mr. Or Mrs. Timbrook's son?

A. No.

Q. And you knew before the trial that victims of a crime could testify in a victim—to give victim impact statements, correct?

A. Correct. **[110]**

Q. For example, actually when it got to the trial, Sgt. Timbrook's father, Richard, testified about Sgt. Timbrook's son; correct?

A. Correct.

Q. And Sgt. Timbrook's widow testified about the pregnancy and birth without her husband; correct?

A. Correct.

Q. She testified about her son being born without a father; correct?

A. Correct.

Q. She testified about how terrible Father's Day was for her; correct?

A. Correct.

Q. And she testified about how her son will never know the joys of being with his father; correct?

A. Correct.

Q. By the turn your time came up on defense, the jury had already heard a substantial amount about Sgt. Timbrook's child; correct?

A. Correct.

Q. Now, you testified that you didn't want to present any evidence that Mr. Bell was a drug user, correct, about this going to Charlestown?

A. Right.

Q. In fact, Mr. Bell was charged with possession **[111]** with intent to distribute cocaine, correct?

A. Yes.

Q. He was charged with possession of cocaine at the same time as a firearm, correct?

A. Right.

Q. And there were witness after witness who testified about either seeing Mr. Bell in possession of drugs or buying drugs from him, correct?

A. Yes.

Q. In fact, you conceded Mr. Bell's possession of cocaine in your closing argument, correct?

A. Yes.

Q. So by the time you got to the penalty phase, there had been an awful lot of evidence that Mr. Bell was involved in drugs, correct?

A. Yes.

Q. Now, I'd like to ask you a couple questions and I'm closing in, Judge, about the mitigation case which was put on. You called Oswald Bell and Marjorie, Bell, correct?

A. Yes.

Q. And you said you wrote an affidavit in which you said that the strategy was to show that the crime had had an impact upon the family, as well as the Timbrooks; correct? **[112]**

A. Yes.

Q. I don't understand how—could you explain to us how it is mitigating to show how that Mr. Bell's crime had an impact on his family?

A. You don't understand how that affects his family?

Q. The fact that he has committed a crime, how is it mitigating that his crime is affecting his family as well as the rest of the community?

A. If Mr. Bell is going—that jury is going to consider whether or not to execute Mr. Bell, then it's important to show that jury, using the Court's words, to humanize him, to show how that will impact his family and our decision was the only way left to humanize him was to show the impact of the family's loss for them was at least similar to the loss that the Timbrooks would suffer. Slightly different reason and methodology, of course, but that they would be in a state of grief as well and they were just as innocent as the Timbrook family.

Q. But isn't it true that Marjorie Bell testified not about the impact of Mr. Bell's execution, but about the impact of the crime and prosecution on her children; that her children were being beaten up, being harassed just for being related to Eddie?

A. That is true. **[113]**

Q. And isn't it true that when Mr.—that the evidence you presented from Oswald Bell, he said, well, if he's guilty, go ahead and punish him?

A. Well, I have to be very candid with you. Mr. Oswald Bell committed something that we all have trouble with and that's, we lost control of a witness.

Q. Isn't it true that first when Mr. Williams asked that question—

A. Mr. Oswald Bell, during the time I'm aware of being interviewed by Mr. Williams, answered his questions differently to Mr. Williams. On the witness stand, he answered differently.

Q. When Mr. Williams asked the question, would you like to tell the jury—

A. Sir, sir, sir—

THE COURT: Wait a minute.

Go ahead.

THE WITNESS: I don't know if it's ever happened to you, but let's go back to your earlier favorite word. You want to talk about surprised. When a witness testifies differently to what they tell you they're going to testify to, that is surprise. That's all I can answer you.

BY MR. CONNELL:

Q. Are you done with your answer because I don't [114] want to interrupt you.

A. No, I'm done.

Q. When Mr. Williams asked the question to Mr. Oswald Bell, now would you tell the jury about how you feel about this whole tragedy, the Commonwealth objected; correct? Do you remember that?

A. Yes.

Q. The Court asked for a proffer of what the answer was going to be, correct?

A. I don't recall that, but I think the proffer was—would have been what I call favorable to Mr. Bell's position.

Q. Sir, I'm showing you what is page 2914 in the joint appendix, the last page, and this is Mr. Williams asking questions of Oswald Bell. Do you see the last question, "now, would you tell this jury about how you feel about the whole tragedy?"

A. Yes, sir, I do see it.

Q. Now I'm turning to the next page, which is 2915 in the joint appendix. Do you see at the beginning, Mr. Thompson says "objection"?

A. Yes, I do.

Q. Right at the top? Then the Court asks, lines 11 and 12, "can you come to the bench and proffer what he's going to say, Mr. Williams?" [115]

A. Yes, I see it.

Q. Could you read Mr. Williams' answer to the Court?

A. "Not sure what he will say. I just want him to tell the jury what impact this had on him and on his family."

Q. Were you present for the preparation of this witness when he was prepped to testify?

A. Sitting in the room with him?

Q. Yes.

A. No. That was, again, the division of labor.

Q. After this closing, after this seven minutes or however many minutes took place, Mr. Williams argued in the closing of the penalty phase that you did not—that you as a defense team did not try to rebut or refute very graphic testimony about a violent man. Do you remember when he argued that?

A. Yes.

Q. If you could have had it, wouldn't you have wanted evidence to rebut the very graphic testimony that Bell was a very violent man?

A. I'm not going to speculate about that.

Q. Mr. Thompson argued in closing there was not one shred of mitigation evidence. Do you remember that?

A. Yes.

Q. If you could have had it, wouldn't you have [116] wanted a shred of mitigating evidence?

A. I'm not going to speculate on that.

MR. CONNELL: That's all I have, Your Honor.

THE COURT: Any further questions?

REDIRECT EXAMINATION

BY MS. BALDWIN:

Q. Mr. Fischel, with regard to these questions about, well, you know, the Commonwealth had already put on evidence and the jury knew that Sgt. Timbrook left a widow who had been pregnant and the Commonwealth already put on evidence that Eddie Bell was a drug dealer. So why didn't you just go ahead and put on some more evidence of the same sort? Why wouldn't you have done that since it was already before the jury?

A. I didn't want to put salt on the wound.

Q. What do you mean by that? Couldn't you have gone ahead and put on all of his girlfriends and his wife and to show that he was a loving father, because they already knew about the victim's widow, so it couldn't have hurt you any. That's the argument that's being made that I'd like you to respond to.

A. My response is, it would just simply compound damage that had already been done and I just think it would have gotten worse and worse.

Q. Are you aware of any reasonable trial attorney [117] who would have done such a thing?

A. Again, I'm not going to speculate about reasonable trial attorneys. I think I'm a reasonable trial attorney and I don't do that.

Q. Were you surprised by any evidence in the penalty phase that the Commonwealth put on?

A. You're using the word surprised, too, and I don't like that word. There was nothing that happened in the penalty phase that I didn't expect.

Q. Did you feel you were unprepared in any way to either know about or respond to any of the aggravating evidence that was put on?

A. None whatsoever.

Q. Do you remember specifically that the Commonwealth put on the evidence of some constable, I think, from Jamaica to talk about the assault conviction in Jamaica? Do you remember that?

A. Yes.

Q. Do you remember that you cross-examined him about the fact that the incident only involved the tearing of a shirt?

A. Correct.

Q. So obviously, you knew information about—

MR. CONNELL: Objection; leading, Your Honor.

[118]

THE COURT: You're leading him. It's really argument that you're making and I'll sustain the objection.

MS. BALDWIN: I'm sorry, Your Honor.

BY MS. BALDWIN:

Q. So did that happen? Did you know about that crime in Jamaica in order for you to have made that cross-examination?

A. Yes.

Q. Do you have any knowledge of whether Dr. Stejskal ever told you or Mr. Williams that he did not have the information that he needed to complete his evaluation?

A. No. I mean, I don't know that no answers the question because it's one of those oddly phrased questions. I never received information or an inquiry or a statement that he didn't have any information he needed.

Q. To your knowledge, would Judge Hupp have allowed $20,000 for a mitigation specialist or a year's time in which for a mitigation specialist to complete a report?

MR. CONNELL: Objection on speculation, Your Honor.

MS. BALDWIN: I think it's a fair question.

THE COURT: Let me rule on the objection. If I need argument, I'll ask you, Ms. Baldwin. [119]

I'll overrule the objection.

Go ahead.

THE WITNESS: Judge Hupp demonstrated to me that he would be extraordinarily conservative in the expenditure of monies for experts in that, for example, we needed a firearms expert of one sort or another that Mr. Williams requested and all due respect to Judge Hupp, it was like pulling teeth.

THE COURT: I think you've answered the question.

THE WITNESS: He's just extraordinarily conservative on spending the Commonwealth's money.

As to the granting of time to do a year, he would have never allowed the docket to go that far. Never. That would be my experience and speculation.

BY MS. BALDWIN:

Q. Thank you. You were asked several questions about other cases in which you asked for and I guess

obtained mitigation specialists; the Steel case, the Matthews case, the White case, the Bean case. My question to you is, did you want mitigation specialists in those cases that you asked for a mitigation specialist?

A. In—

THE COURT: Why would he have asked for them **[120]** if he didn't want them?

MS. BALDWIN: I guess what I'm trying to establish, Your Honor—

THE COURT: It seems to me I can answer most of these questions you're asking, Ms. Baldwin.

Isn't that right? If you move for a mitigation specialist, you want a mitigation specialist?

THE WITNESS: That's a good conclusion, but it might not be absolutely correct because I don't think in two of those cases I was lead counsel, nor was I actually initially appointed. Somebody else was actually the moving party, but I don't remember who signed the pleadings. I think in two of them, we didn't use one.

BY MS. BALDWIN:

Q. I was inartfully asking, but I'm asking you to respond to the implication of the questioning that because you asked for mitigation specialists in some cases, then you should have asked for one in the Bell case.

MR. CONNELL: Object to leading and argumentative. She's just stating a conclusion.

THE COURT: Yeah. I really think this is argument, Ms. Baldwin. I understand what you're saying. There's been no facts to the contrary. **[121]**

Let's move along, please. I think we've kept this witness on the stand probably longer than we really needed to. We've gone over a lot of ground. I think we're not plowing any new ground. I'd really like to call this to a close unless you have some important question you need to ask him, Ms. Baldwin.

BY MS. BALDWIN:

Q. Well, I do want to ask you this. You were questioned quite a bit about your theory of taking inconsistent positions on the guilt phase and sentencing phase. I guess what I want you to make clear what your position is as to whether you look at this on a case by case basis or whether you think there's a hard and fast rule that where you contest guilt, you would never present anything in mitigation. I certainly want you to make it clear for the record what your position is on that.

A. First of all, it's not a hard and fast rule. I would say that it's equally so that it's never a "no mitigation" situation. There's always got to be something in mitigation. But you've got to find that tension in between that works in a case and it's really just a balancing act.

Q. So your testimony on that point is that in the Bell case—[122]

MR. CONNELL: Objection to leading, Your Honor.

THE COURT: I think I'll sustain the objection as leading. I understand the witness's question. It's not a hard and fast rule. He looks at every case. He did what he did in the Bell case because he felt it was the right course.

MS. BALDWIN: I have one last question.

THE WITNESS: Your Honor, I don't want to ever supercede a judge. You said course. I would say strategy.

BY MS. BALDWIN:

Q. Do you remember in this case in the sentencing phase, when at the conclusion of the case when Judge Hupp asked Bell whether he had anything to say during the allocution? Do you remember that? Do you remember what Mr. Bell said or didn't say?

A. No, I don't.

MR. CONNELL: Objection. Beyond the scope, Your Honor. I'm we're plowing new ground here.

THE COURT: He said he didn't remember.

MS. BALDWIN: Thank you, Your Honor.

THE COURT: Thank you, sir. You are excused.

Ladies and gentlemen, we're going to take a **[123]** luncheon break now. We'll be in recess for 45 minutes for lunch.

(Recess at 12:30 p.m. until 1:15 p.m.)

You may call your next witness.

MS. BALDWIN: Respondent calls Mark Williams.

MARK WILLIAMS, CALLED AS A WITNESS BY RESPONDENT, SWORN

DIRECT EXAMINATION

BY MS. BALDWIN:

Q. Mr. Williams, make sure that you speak right into the microphone and let me know if you can't hear me. We've had a little trouble with acoustics in here.

Would you please state your name for the record?

A. Mark Williams.

Q. What is your occupation?

A. I'm an attorney.

THE COURT: Mr. Williams, I think maybe you better lean right up into that microphone. It's a little hard to hear unless you're up really close to it.

BY MS. BALDWIN:

Q. You're an attorney. When were you licensed to practice law?

A. 1990.

Q. At the time of your representation of Edward Bell, what percentage of your practice was criminal [124] cases?

A. It was about 60 percent at that time.

Q. This was your first capital case?

A. Yes, ma'am.

Q. What other criminal experience did you have before that time?

A. I had tried three first degree murder cases before then. I had tried a number of other type of felony trials, many District Court type cases.

Q. What was your occupation before you went to law school?

A. I was a social worker.

Q. For how long were you a social worker?

A. 20 years.

Q. Where were you a social worker?

A. I was a social worker in Spotsylvania County from 1974 to 1980. Then I was a social worker supervisor in Fauquier County from 1981 through 1995.

Q. How did you come to represent Edward Bell?

A. Mr. Fischel, who's a friend of mine and a colleague, had asked me to assist him on one of—Mr. Snook had withdrawn from the case and he asked if I was interested in helping him represent Mr. Bell.

Q. What was your role in the case?

A. Well, my role was basically to do the field work **[125]** in the case, to interview witnesses. I was to prepare the mitigation phase of the case. But basically to do field work in the case. Mr. Fischel did a lot of the legal issues, but I was working with witnesses and that sort of thing.

Q. I'm going to read from page 111 of the habeas corpus petition which is an allegation against you pertaining to the investigation of mitigation. I'm going to ask you to respond to this sentence.

It says, "rather than pursue a diligent investigation, Williams simply decided after only summary interviews which did not delve into Bell's background, mental capacity, relationships with his family, alcohol and drug use or any other mitigating factor, that there was no evidence that would assist in mitigating the case against Bell."

Is that correct?

A. No, that's not true.

Q. Well, please explain why it isn't.

A. Well, we initially—Dr. Stejskal was appointed as the mental health expert.

Q. Did you know Dr. Stejskal?

A. Not before this case, no. Dr. Stejskal belonged to the UVA group of public policy and law and when we met or when I met with him, I gave them the information **[126]** that I had gathered from some of

Mr. Bell's family and they were to do that part of the investigation.

Q. What was the part that you had done before then?

A. I had interviewed Mr. Bell, two of his sisters. I had met his mother. I talked to Mr. Bell about his background and then I gave what information I had to them and they further investigated it.

Q. Did you have any trouble communicating with Mr. Bell, with your client?

A. He had or he has a thick accent, but I could understand him.

Q. Did you explain to him what mitigation was?

A. Yes, ma'am.

Q. What was the nature of your conversation with him regarding that?

A. Well, I asked him about growing up, his family, his relationships, things that happened to him as a child, those sorts of things.

Q. Then you said that you spoke to some of his family?

A. Yes, I did.

Q. What were the nature of those conversations and any information that you learned from them?

A. The same sorts of things, their life in Jamaica, how they came to the United States, what they had done **[127]** since coming to the United States.

Q. Did you find out anything in particular about any type of particular injuries or medical illnesses that he had?

A. Yes. I don't remember who told me, but he had been hit in the head when he was 10 or 12 years old and I believe was unconscious for a few days.

Q. What did you do with that information?

A. I told Dr. Stejskal about that.

Q. Any other information that you obtained that you gave to Dr. Stejskal?

A. There was some information from, I guess, Marie Deans, who had been the mitigation investigator before, that she had interviewed Mr. Bell and because of his dialect or his accent, she thought he was slow or there was possible, some sort of organic brain damage or something like that. I told him about that.

Q. You told who?

A. Dr. Stejskal.

Q. Did you inquire about any abuse, sexual or physical abuse?

A. I talked to Eddie about that, had anything traumatic happened to him in his upbringing.

Q. What did you learn?

A. There was nothing significant. **[128]**

Q. Did you speak to his family or ask his family about any of that?

A. I believe I talked to his sisters about that.

Q. What did they say?

A. Same thing. There was really nothing significant in his background about abuse or anything like that.

Q. What about records? Did you collect any records?

A. I did not. Mr. Fischel had been in contact with the consulate over other issues and he attempted to get records from Jamaica, without success, and Dr. Stejskal and his group had did the same thing. But I did not.

Q. Now with respect to any specific witnesses, you just said you had a conversation with his mother?

A. Yes, ma'am.

Q. And what type of conversation did you have with her?

A. Well, Mr. Bell's mother, it appeared and according to his sisters, was suffering possibly from dementia something. She didn't really understand what was going on. I don't believe she understood what predicament Eddie was in at the time.

THE COURT: Was that from your talking with her or from what you got from his sisters?

THE WITNESS: Both.

BY MS. BALDWIN: **[129]**

Q. Did you speak with Bell's father?

A. I did not. I had made several appointments and asked for him to be there. I went to the house several times and he was never there. I would call and ask him to call me. I did speak to him prior to trial, just prior to trial because we subpoenaed him, but he was never there when I visited the home or never returned any phone calls.

Q. What about Tracy Nicholson? Did you have any contact with her?

A. I did.

Q. Tell us the nature of that contact and what you learned.

A. In talking with Tracy, I got some more background about Eddie and her relationship with him and his children and she also was helping me try to find witnesses. We were looking for people

who would possibly have information about the shooting, that would help Mr. Bell.

Q. What about with respect to any mitigation evidence?

A. In talking to her, there had been issues of spousal—or not spousal abuse, but domestic violence. In talking with her about that, she said some of these things had happened. We had gotten reports that things **[130]** were—different things. She kind of minimized those, but she said Eddie had been somewhat abusive to her at times. It wasn't a regular thing, but he had been abusive towards her.

Q. How many sisters did you speak to?

A. I spoke to two sisters.

Q. Who were they?

A. Marjorie, and I don't recall the other sister's name.

Q. Do you have any knowledge about a sister in Jamaica by the name of Nelly?

A. Yes. One of the psychologists on Dr. Stejskal's staff had contact with her in Jamaica.

Q. Did you reach any conclusions about any of the family or use of them as far as witnesses in the case?

A. No. There did not seem anything really compelling about his background, such as abuse, mental illness or abandonment, neglect or anything like that that hit me as compelling as mitigation evidence.

Q. Did you have any contact with Joanne Nicholson?

A. Yes, I did.

Q. Please tell the Court about that.

A. The same kind of thing. They were helping me find witnesses and also spoke to her about Eddie. She was quite fond of Eddie. Said he was a good father. **[131]**

Q. Did you ask her to be a mitigation witness for you?

A. I talked to her about being a witness. She did not want to testify.

Q. She told you she did not want to testify.

A. She said she did not want to testify.

Q. Did either Joanne or Tracy Nicholson mention to you anything about the incident with Billy Joe Swartz that was presented as aggravating evidence in the case by the Commonwealth?

A. As I recall, I believe Ms. Nicholson said it wasn't as bad as portrayed, but something had happened and I don't recall the details.

THE COURT: Why did Ms. Nicholson say she didn't want to be a witness?

THE WITNESS: Judge, I'm not sure. I think she wanted to observe the trial. That was my impression.

THE COURT: So she wanted to sit in on the trial and she couldn't sit in on the trial and be a witness.

THE WITNESS: Yes, that's correct.

THE COURT: So you said okay.

THE WITNESS: In looking at it, I didn't think Mrs. Nicholson would provide us, again, with very **[132]** good information for a jury, considering the fact that Mr. Bell had four children by three different women. He didn't pay any child support for these children and I felt when you –when I bring a witness in, I try to look at both sides. What is the

Commonwealth going to do with my witness? Is my witness going to hurt me or is it going to help me? My view at that time, that getting information that Eddie Bell was a loving father, but he didn't pay child support, had children by different women, I didn't think helped our case.

BY MS. BALDWIN:

Q. What about the witness, Dawn Jones? Did you have any contact with her?

A. I don't recall having any contact with her, no.

Q. Do you know who she is?

A. Yes. I think she was—she had a child by Mr. Bell.

Q. Are you aware of the fact or do you remember that she was a witness for the Commonwealth during the sentencing phase?

A. She was. She testified at some point Mr. Bell came in and I believe pulled a gun on somebody. We knew that was going to come in.

THE COURT: But you had not interviewed her prior to trial. [133]

THE WITNESS: No. Again, it was the same thing. Mr. Bell did not provide any child support for his children. I didn't think—that would come out, I felt, in cross-examination, if we brought her in, and the fact she was a Commonwealth witness.

THE COURT: You didn't try to interview her to see what she would say?

THE WITNESS: I don't recall. I know I tried a number of witnesses. I don't recall whether I tried her or not.

BY MS. BALDWIN:

Q. Were you advised by the Commonwealth before the sentencing phase of unadjudicated acts of violence that were going to be presented?

A. Yes.

Q. Was that one of them?

A. Yes, it was.

Q. That you were provided information about?

A. Yes.

Q. Now, were you familiar with Barbara Williams?

A. Yes, I believe that was Mr. Bell's wife in Jamaica.

Q. I'm calling her Williams now. I don't think that was her last name then. So did you try and talk to her?

A. No, I did not. Again, my understanding was Dr. [134] Stejskal and his people had contact with people in Jamaica.

Q. And did you believe that there was any point in trying to contact her or anybody else in Jamaica that was related to Edward Bell?

A. Well, as far as his wife, again, it was an issue of here was a man who's come to the United States, basically abandoning his wife and child. He wasn't sending child support back. I don't think he had been back to Jamaica in quite a while. I certainly didn't think—if you brought her in and had her testify, that's the kind of thing the Commonwealth is going to ask her. I just didn't feel that, again, would be helpful to our case.

Q. You were aware that Marie Deans had previously been appointed in this case as the mitigation specialist?

A. Yes.

Q. And you were also—were you aware that the Court had, and I'm not sure if it was before you were appointed or shortly after, had said you could hire another mitigation specialist if you wanted one. Do you remember that?

A. Vaguely, yes.

Q. Why didn't you? [135]

A. Again, when we got with—Dr. Stejskal was appointed, they were capable of doing the same sort of thing. They did background investigation, prepared the family history. So those efforts would have been duplicative, as far as I was concerned.

Q. Was there anything in Dr. Stejskal's report that you believed was missing from what you needed to determine a mitigation case?

A. No. There didn't appear to be any significant abuse or neglect or abandonment or anything like that. There was no mental illness. I don't believe there was any evidence that Mr. Bell was retarded. There just didn't seem to be any compelling information that they received from the family and his testing.

Q. Did Dr. Stejskal's report, the part that was the background in family history part of the report, did any of that prompt you to think that you needed to follow up on any investigation? Did any of that, in other words, prompt you to think that there was a lead you should follow through and investigate further?

A. No, I didn't see anything in his report that would prompt.

Q. Would Judge Hupp, in your opinion, have authorized $20,000 for a mitigation specialist or a year in which to prepare a mitigation report? **[136]**

A. No. Judge Hupp was rather frugal with funds. I had attempted to get a gunshot residue expert and I found one in Maryland and one in IndianA. And he said, I want you to use the one in Maryland because he's much cheaper to bring here. It turned out that that fellow really didn't have the qualification and Judge Hupp did approve the funds, but no, he wouldn't have approved $20,000, in my view, to go to Jamaica or continue the case for a year.

Q. When you—did you have communications with Dr. Stejskal apart from just receiving his report?

A. Oh, yeah, I talked to him by phone. I met with his group on two occasions. I spoke with him by phone on several occasions.

Q. Did he ever advise you that it was not really his job to be a mitigation investigator and that he was relying on you to provide him with information?

A. No, no.

Q. Did he ever give you any indication that that was the case?

A. No.

THE COURT: Let me ask you about just the time line here.

You're familiar with the letter that Dr. Stejskal sent to you, dated January 7, 2001. It's been **[137]** introduced in these proceedings as Petitioner's Exhibit #4. You're familiar with that letter.

THE WITNESS: I am.

THE COURT: Apparently, that letter followed a conference that you had with him in December in which you presumably discussed many of the things he set forth in the letter.

THE WITNESS: That's correct. I met with his team. There were, I believe, another psychologist and he had some graduate students that were working.

THE COURT: There was Connie Beck.

THE WITNESS: That's correct.

THE COURT: P.hd forensic psychology Fellow that assisted him and did many interviews.

THE WITNESS: He, I believe, also used graduate students, also working. They seemed to be familiar with the case. I recall some of them being at the meetings.

THE COURT: But you've talked to certain of the people, and I think you've outlined in your responses to counsel's questions who you talked to and others you didn't talk to. And you said that you understood that his team or the UVA people were going to perhaps talk to other people; is that right?

THE WITNESS: Yes, sir. **[138]**

THE COURT: Was this letter when you got a report on who they had talked to?

THE WITNESS: Again, it's been a long time. We had a meeting in early December and we discussed what he had found then and I believe this was just the embodiment of his report.

THE COURT: Basically, you did some interviews and then sort of turned it over to him?

THE WITNESS: Yes, sir.

THE COURT: And got this report? I think he says the meeting was on December 14 of 2000.

THE WITNESS: That sounds—

THE COURT: That was about a month or so before trial.

THE WITNESS: Yes, sir.

THE COURT: Maybe a little longer. I guess trial was the third week of January or something like that. That's sort of the sequence of how the interviews of witnesses went?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

BY MS. BALDWIN:

Q. What did Dr. Stejskal tell you with respect to your client's intellectual capability?

A. The issue, I guess, came up about whether he was **[139]** possibly retarded or had some organic brain damage. He felt that during his testing that Eddie was feigning, not trying as hard as he should and trying to skew the results. He told me that he felt Eddie had kind of an average IQ for a criminal, some words to that effect.

Q. And this was before the Atkins case, is that correct?

A. Yes, it was, I think.

Q. Did you explore with Dr. Stejskal or with Edward Bell or with any family members or anybody else any potential drug history that he may have had?

A. Well, yes. Dr. Stejskal, in his interviews with Mr. Bell, said that Eddie smoked marijuana regularly from when he was 10 or 12 years old. I remember we kind of laughed. We said that's not

the kind of evidence you want to put up, that he's been breaking the law all these years. Neither one of us felt that was very compelling to bring out, that he was a regular drug user of marijuana for over 20 years.

Q. So what did you decide with respect to Dr. Stejskal?

A. Well, he had said he didn't think he could help us. There were no issues of mental illness or anything that he felt would be mitigating from a mental health standpoint. He felt on cross-examination that he would **[140]** actually hurt the case because things would come out about Eddie, Mr. Bell's version of the events about feigning—I can't remember how he phrased it, but faking it on the testing.

Q. Faced with that, what was your strategy?

A. Well, at that time, it appeared there really wasn't any compelling history of Eddie Bell that would be useful. Again, there were no issues of abuse, neglect, abandonment, no mental illness. So we didn't feel that we had a whole lot to say good about Mr. Bell, unfortunately. The issue about his children and being a good father kind of cut both ways. In looking at it, I felt that the fact that here was a man who had again, four children by three different women, he abandoned one child in Jamaica and didn't support any of them, would cut against the case.

Q. Did you know that he loved his children or that he gave his children gifts?

A. I knew that. He said that and Ms. Nicholson told me that.

Q. Why didn't you consider that something you should present to the jury?

A. Because I felt it would come out he did not pay child support.

Q. How would that have come out? [141]

A. I imagine, on cross-examination, if they asked, well, did he love, did he support his children, did he pay—

THE COURT: He wasn't in violation of any child support order that you knew of?

THE WITNESS: No, I don't think anybody sought child support, no. He just didn't pay them any support.

THE COURT: Well, how do you know that?

THE WITNESS: Because they said so.

THE COURT: Who said that?

THE WITNESS: Tracy Nicholson, I believe; Dr. Stejskal in his report, I think, reflected that, that he didn't pay child support. He said he gave gifts.

BY MS. BALDWIN:

Q. Is there any other way that you think the Commonwealth would have potentially hurt you if you had tried to present evidence of Eddie being a good father or giving his children gifts?

A. The other issue in the case was Sgt. Timbrook's wife was pregnant at the time he was murdered and actually had a child subsequent to the trial. I felt that, again, focusing on Eddie Bell and his children would reinforce that in the Commonwealth's argument [142] about, here's Eddie Bell, the good, loving father who didn't pay child support and here is this young Timbrook child who's never met his father, never will get to meet his

father. Again, I felt that would just look very bad for a jury.

Q. Do you remember during the post verdict hearing in the case, this is after the jury has given a death sentence and you have, in Virginia, the post verdict hearing? Do you remember that hearing with the judge?

A. Yes.

Q. Did you put on evidence there?

A. We did. We put on evidence from different jailers who had been there to show that Eddie had not caused any trouble, basically, since the verdict.

Q. Do you remember at sentencing what evidence the Commonwealth had put on with respect to Eddie's behavior in jail?

A. At the—

Q. Before the jury. Excuse me.

A. Yes. They put on evidence he had threatened guards, that sort of thing.

Q. Do you remember what Bell's words were to the judge when the judge performed the allocution, asked him if he had anything to say?

A. As I recall, he accused Paul Thompson of framing [143] him. It was something he directed about the Commonwealth Attorney.

Q. Was there any information that you believed that you needed that you did not have in order to present a case in mitigation?

A. No, ma'am.

Q. What was your strategy in using the two witnesses that you used at sentencing?

A. Well, what I was trying to show is that Eddie Bell's family, they were good people. They were

immigrants here. They came to this country. They worked hard. His sister, one sister who testified, had a couple jobs, had children, was going to community college, trying to better herself. One of the things I wanted to show that this affected their family. This case had affected their family. She had been hassled by the police. I believe that was some of the testimony—

THE COURT: How does that help Mr. Bell, to show that his actions hurt his own family?

THE WITNESS: Well, Judge, looking back, what I felt was, I knew the jury didn't like Mr. Bell, obviously. They had convicted him. But to show that his family, they were people, too, and that there's another side to all this, them, anyway, as being decent people. **[144]**

THE COURT: But what you had them saying was that his actions hurt them, right?

THE WITNESS: Right, but they did not want him to die.

THE COURT: How does that show that? You show he had a sister and father. I guess that had come out before. I just wondered what your thinking there was.

THE WITNESS: Again, Judge, in the absence of—

THE COURT: You didn't ask them what effect his death would have.

THE WITNESS: No, I did not. I don't recall asking that.

THE COURT: I just wondered what your thinking there was in regard to that.

THE WITNESS: Again, just to show that these were hardworking people and that they were decent folks.

BY MS. BALDWIN:

Q. Do you remember receiving the pre-sentence report in this case?

A. Yes.

Q. Do you remember the employment history in that report?

A. His employment history was somewhat sporadic, I **[145]** think.

Q. Mr. Williams, you've reviewed the habeas claims in this case. Is there anything that you did not know that's been brought out in those habeas claims that you either didn't know or you feel like if you had known, you would have done something different in this case?

A. No, ma'am.

MS. BALDWIN: No further questions.

THE COURT: Just to be clear, is it your position, no matter what good things Mr. Bell's wife or girlfriends could have said about him, either in relation to them or to his several children, you—your decision was to not introduce that, regardless, assuming it had been very good. You really weren't interested because of this strategic consideration that you had.

THE WITNESS: That's right. I felt and again, in talking with Mr. Fischel, that by presenting that, there were down sides to it also and it was better not to.

THE COURT: So the evidence that—had there been evidence that you knew about that Mr. Bell was

a good father, that he cared about his children, that he had evidenced love and affection to his children over a period of time, to you, that was—you were not—you did not believe that that would be helpful **[146]** evidence in regard to Mr. Bell.

THE WITNESS: That's correct, given the fact that he didn't pay child support and again, the fact that Kelly Timbrook had just given birth to a child. I felt the Commonwealth's come-back argument to that, that he would dwell on those sorts of things.

MS. BALDWIN: Your Honor's questions has prompted something, if I could ask?

THE COURT: Yes, ma'am.

BY MS. BALDWIN:

Q. Mr. Williams, regardless of what witnesses may be saying now seven years later, did you have any evidence seven years ago from any of these witnesses that Edward Bell was a particularly outstanding character or particularly nurturing or loving father or particularly—or that he provided for his children or anything else such that it would have caused you to have wanted to put them on the stand?

A. If I may respond to that. I've reviewed the report from the current mitigation investigator. What you have to understand, the climate at the time of this trial, this case received great, great notoriety all through Winchester. It affected, it seemed, the whole community. Ricky Timbrook was a local young man, athlete, had gone to college and came back and had been **[147]** very successful in the police force. There were not a lot of people who were friends of Eddie Bell who were willing to talk to you. People did not want to talk to you about the case. The police were harassing people about—if they

would talk to lawyers involved in the case. They did not want to talk. But even now in looking at that report, I don't see anything compelling in that report that I would have used.

MS. BALDWIN: Thank you.

CROSS-EXAMINATION

BY MR. CONNELL:

Q. Good afternoon, Mr. Williams. Can you hear me okay? There have been issues with that.

A. I'm having a little trouble.

Q. I'd like to begin with how you became involved in the case.

THE COURT: Let's not repeat any of the things we've already gone over.

MR. CONNELL: I don't plan to do that, Your Honor. I plan to keep it clean and relatively short.

THE COURT: Yes, sir.

BY MR. CONNELL:

Q. You were appointed in June of 2004; correct?

A. Yes.

Q. It was your first capital case? [148]

A. That's correct.

Q. You had never done a mitigation investigation.

A. I had not.

Q. Never done a capital case.

A. No.

Q. You were not on the list of capital qualified attorneys.

A. I was not.

Q. You knew that your primary task was going to be the mitigation investigation.

A. That's correct.

Q. Mr. Fischel told you that.

A. Yes.

Q. During the course of the case, you prepared billing records to submit to the Court, correct?

A. I'm sorry?

Q. To get paid, you prepared billing reports and sent them in to this court.

A. Yes.

Q. And those billing records determined how much you got paid, correct?

A. That's correct.

Q. You knew it was important to be complete and truthful on those?

A. Yes. **[149]**

Q. So your interview, your first interview of Marjorie Bell occurred on June 21, correct?

A. I don't know.

Q. If that's what your billing records reflect?

A. If that's what the billing records would indicate, yes.

Q. Does it sound right your interview of Diane Howard occurred on June 28?

A. If that's what the records show.

Q. Then you had a telephone conference with Marjorie Bell on July 12, right?

A. If that's—I'm not seeing anything on this screen.

Q. And do you want to see to refresh your recollection?

A. No, if that's what it says, that's what it is.

Q. Finally on July 15, there was an interview with Roslyn Bell and Marjorie Bell. Does that sound right?

A. If that's what the records show.

Q. After those interviews—and just to be clear, that was when you hit the ground running, you got in the case, you went out there and started interviewing the witnesses, correct?

A. Yes.

Q. And those are the witnesses you talked about on **[150]** direct; the sisters, the mother. Roslyn is the mother, correct?

A. Yes.

Q. And those are the witnesses you talked about on direct that you interviewed.

A. That's right.

Q. After you had interviewed those, you wrote a memorandum about what you had found, correct?

A. I don't specifically recall.

THE COURT: Let me hand the witness the memo that's been introduced.

MR. CONNELL: Is that 10, Your Honor?

THE COURT: Yes, I believe it's Exhibit #10, is it not?

THE WITNESS: Yeah, I recall this.

BY MR. CONNELL:

Q. That's a true and accurate copy of a memorandum that you wrote.

A. Yes.

Q. I'm not going to go through the contents of that memorandum, but I am interested in roughly, when was the next time you had a conversation with Mr. Fischel after you wrote that memo?

A. I don't remember.

Q. Was it more than a month or less than a month? [151]

MS. BALDWIN: He says he doesn't remember, Your Honor.

THE WITNESS: I have no memory of it. I don't know.

BY MR. CONNELL:

Q. The next time that you spoke to Mr. Fischel, did he comment on the mitigation investigation that you had done so far?

A. I don't remember.

Q. So you don't remember him saying, you need to go do more, for example?

A. I don't remember that, no.

Q. You testified that you had two meetings with Dr. Stejskal, correct?

A. As I recall, yes.

Q. When was the first of those?

A. It would have been in October.

Q. In October. It was at that time you told him, listen, we have some suspicion of brain damage from Marie Deans; correct?

A. I guess so. I assume I told him that then.

Q. And you told him, we have a self-report of a closed head injury, but we don't have any witnesses confirming it; correct?

A. I assume I said that to him. [152]

Q. And was there any other information from your mitigation investigation that you provided to Dr. Stejskal?

A. I don't recall.

Q. You didn't meet again with Dr. Stejskal until December 14 of the year 2000, correct?

A. If that's what the records show.

Q. During that period of time between October when you had your first meeting and December 14, you weren't directing Dr. Stejskal's investigation, correct?

A. No, not at all.

Q. You weren't telling him go interview this person, don't interview that person, that sort of thing?

A. I assumed he knew what he was doing.

Q. So you turned it over to him in October and then said, we'll touch base again in December, and that's what you did.

A. As I recall, yes.

Q. I'd like to talk to you about the December 14 meeting for a moment. You went down to Charlottesville for that?

A. Yes.

Q. And met Dr. Stejskal at UVA. And he had a Doctoral Fellow, Connie Beck, with him?

A. As I recall. **[153]**

Q. Mr. Williams, I'm giving you your own copy and I'll also put it on the screen and you can look at whichever seems to make sense to you. Is this your handwriting?

A. It appears so.

Q. Is there any question it's your handwriting?

A. No, no, no.

Q. These are the notes you took of the meeting, correct?

A. I assume that's what this is.

Q. They look familiar to you? Do you need a chance to read them?

A. No.

Q. I'm sorry. It's my fault for asking a compound question. Do they look familiar to you?

THE COURT: He's testified these are his notes. Let's move along.

These are your notes of your interview with the doctor on December 15?

THE WITNESS: These are my notes.

MR. CONNELL: I'll move this, Your Honor, as our petitioner's number next.

THE COURT: It will be admitted as #12, Petitioner's 12.

(Petitioner Exhibit #12 was marked for **[154]** identification and admitted into evidence).

BY MR. CONNELL:

Q. I'd like to turn your attention—if you would turn the page on your notes, please, to the second page. There's diagonally, and I'm going to mark it on the screen, diagonally, there's a note written there. Could you read what I've highlighted on the screen?

A. It says "fax Dr. Beck witness list for Marjorie. Most unknown." I think that's what it says.

Q. Maybe "mark unknowns"?

A. I don't know.

Q. Hard to tell. At this meeting, Dr. Stejskal and Connie Beck told you about a witness, Nelly Hutchinson Walker; correct?

A. I don't recall that, no.

Q. You testified—we're going to move away from that meeting for a moment.

You testified that when you talked to Tracy Nicholson, she was helping up find witnesses; correct?

A. Yes.

Q. She was talking to you about rumors on the street of what had happened, that kind of thing?

A. Yes.

Q. Some of which was useful and some of which was not so useful; correct, fair? **[155]**

A. Yes.

Q. You said that she minimized any report of domestic violence, correct?

A. As I recall, yeah.

Q. Your conclusion was that, what you took away from it was that Mr. Bell had been somewhat abusive at times, that it wasn't a regular thing.

A. That was my impression.

Q. Now, you testified that Mr. Bell was not paying child support to his children and that was an important factor in your thinking.

A. In my thinking, yes.

Q. At the time he was arrested, Mr. Bell had been living with Tracy Nicholson and her children, correct?

A. As I recall, yes.

Q. And you didn't talk to Dawn Jones, correct?

A. I don't believe I did, no.

Q. And you didn't talk to Barbara Williams, correct?

A. No.

Q. My fault for asking the question that way. It is correct you did not talk to Barbara Williams.

A. I did not talk to Barbara Williams.

Q. You testified on direct examination that you didn't try to contact Barbara Williams because it was your understanding that Dr. Stejskal was going to [156] contact the Jamaican witnesses; correct?

A. He was contacting those type of witnesses was my understanding, yes.

Q. Do you know how many, if any, witnesses, Dr. Stejskal or his associate contacted in Jamaica?

A. I know he made contact with, I believe it was an aunt. She was a potential witness. I believe she died before trial.

Q. That was the witness that you learned about at the meeting on December 14, correct?

A. Yes.

Q. And on December 14, you also received a fax letter from Dr. Beck telling you that she was dead; correct?

A. I received a letter. I don't remember the date, yes.

Q. Now, you were asked questions about what judge, in your opinion, Judge Hupp would authorize. I just want to kind of like real quick what you had in this case. Judge Hupp authorized money for an investigator, is that right?

A. You mean, like a—

Q. Fact investigator?

A. Yes.

Q. Judge Hupp authorized money for a mitigation [157] specialist?

A. Yes.

Q. Judge Hupp authorized money for a gunshot residue expert?

A. Yes.

Q. Judge Hupp authorized money for a ballistics expert?

A. No.

Q. I thought you testified on direct—

A. No, just gunshot residue.

Q. And he funded a DNA investigation, right?

A. Yes.

Q. He turned you down on Mr. Aiken, the penologist, correct?

A. Right. We wanted him for mitigation to testify about prison life.

Q. And then afterward, you asked the judge again and he turned you down again for Mr. Aiken.

A. As I recall, yes.

Q. That was because, in his opinion, Virginia law did not permit that kind of evidence to be introduced.

A. I think a case had just come down from the Supreme Court right in the midst of the motions proceedings and he felt it precluded that type of testimony. **[158]**

Q. Now, you were asked on direct examination about the May 21 post—could I call it a judge sentencing and will you know what I'm talking about?

A. Yes.

Q. As opposed from the sentencing in front of the jury?

A. Yes.

Q. Shortly before, about a week-and-a-half before that, Mr. Fischel had sent you a memorandum, correct?

A. I don't recall.

Q. Let me give you a copy to refresh your recollection.

Have you had an opportunity to review that?

A. Yes, I have.

Q. Do you recall receiving that memorandum?

A. Yes.

MR. CONNELL: I move its admission, Your Honor.

THE COURT: It will be admitted. That's Petitioner's Exhibit #13.

(Petitioner Exhibit #13 was marked for identification and admitted into evidence).

BY MR. CONNELL:

Q. In this memorandum—would you just read item #2, what Mr. Fischel asked you to do? **[159]**

A. "Please review all these materials and follow up with family and friends of Eddie Bell to develop comparable testimony at the sentencing to show how Eddie's friends and family have been impacted by this process."

Q. For whatever reason, you did not do that, correct?

A. No.

Q. I may have made another mistake. It is correct you did not do that.

A. I did not—

Q. Follow up with friends and family.

A. I don't recall what I did. I know we didn't call any of his family or friends to the stand.

Q. You testified on direct that you called different jailers, is that right?

A. As I recall, yes.

Q. I'm going to show you what is from the joint appendix as page 3047. Do you see what's there on the screen? Can you see in front of you?

A. Yes.

Q. That Paul J. Criger, that's the person you're talking about?

A. I assume.

Q. I'll show you page 3048. In fact, one person **[160]** testified, Mr. Criger, correct?

A. I guess so. I think he was—he may have been the captain. I can't remember.

Q. Some supervisory position.

A. He would have had access to, I guess, all the guards and reports and that sort of thing. He was some supervisory person.

Q. He testified about one page of transcript, about a minute?

A. That's correct.

Q. Now, I wanted to talk to you about the mitigation case that you had actually put on.

THE COURT: For the record, just so it's clear, this proceeding before the judge was, of course, after the jury's verdict in which they sentenced your client to death.

THE WITNESS: Yes, sir.

THE COURT: But then there was a formal imposition of the death penalty.

THE WITNESS: That's correct.

THE COURT: Theoretically, the judge had some discretion there?

THE WITNESS: Theoretically.

THE COURT: But you didn't really expect that. **[161]**

THE WITNESS: No, sir, I did not.

BY MR. CONNELL:

Q. You talked about the fact that you called Marjorie Bell to the stand, on direct examination. You said that you wanted to show she was a real human being; correct?

A. Yes.

Q. And you said she had had a couple of jobs, correct?

A. Right.

Q. And that he had children, correct?

A. Yeah.

Q. In your view, that made her something of a human being, a real person.

A. That's correct.

Q. Humanized her to the jury, so to speak.

A. Yes.

Q. When you asked her what has been the impact of this whole tragedy upon you, she told you about the problems that the case or the prosecution and the crime had caused for her and her children; correct?

A. Yes, as I recall, yeah.

Q. And you asked—you said that you wanted to show that these people didn't want Eddie to die, correct? Let me rephrase my question. You called these witnesses, you **[162]** testified on direct examination, because you wanted to show these family members did not want Bell to die; correct?

A. Yes.

Q. And you asked—you elicited from Mr. Bell that—Oswald Bell—if Eddie Bell was guilty, he should be punished; correct?

A. I don't recall. If that's what the transcript says. I don't recall.

Q. You were asked on direct examination about receiving the pre-sentence report. The first time that you read that pre-sentence report was on May 21, attached to that memo when Mr. Fischel sent it to you; correct?

A. I assume, if it was attached.

Q. So before that, you did not have any information about his employment history, correct?

A. Other than talking to him and his family members.

Q. And sir, I'm going to show you a document and do you recognize the handwriting on this document?

A. That's my handwriting.

Q. I'm going to show you—are these notes of an interview that you had with Mr. Bell on, presumably, June 14, 2000? I'll hand you a copy if that's more convenient to you. **[163]**

A. Yeah, I've seen it, yeah.

Q. I'd like to show you—would you turn to the second page? Do you see down at the bottom, I'm marking it on the screen. Do you see a line above which it says "Jobs in U.S."?

A. Yes.

Q. Those are notes that you took on what Mr. Bell told you when you asked about his employment, correct?

A. Yes.

Q. So when you say you had information about his employment from him, this is what you mean; correct?

A. Yes.

MR. CONNELL: That's all I have.

Thank you, Your Honor.

THE COURT: Thank you.

Any further questions for the witness?

MS. BALDWIN: Just a couple questions.

THE COURT: Did you want to introduce this?

MR. CONNELL: Yes, please, Your Honor. Thank you.

THE COURT: That is Petitioner's Exhibit #14. It will be admitted.

(Petitioner Exhibit #14 was marked for identification and admitted into evidence).

REDIRECT EXAMINATION [164]

BY MS. BALDWIN:

Q. Mr. Williams, the investigator that Judge Hupp authorized funds for, was that an investigator—I'm not talking about Marie Deans or the mitigation investigator, the other investigator. Was that for mitigation?

A. No, that was a filter to help with the investigation of guilt and innocence. He was a retired police officer, as I recall.

THE COURT: What do you mean? Why did you limit it to guilt or innocence?

THE WITNESS: Well, at the time, he had just been appointed. We gave him some assignments to do and he never really did anything. I don't know if it was because--

THE COURT: I understood he never did anything, but I just wanted to make sure, are you saying that he was appointed only to investigate guilt or innocence issues?

THE WITNESS: No, he was appointed as an investigator.

THE COURT: Generally.

THE WITNESS: The first assignments we gave him—

THE COURT: And he didn't do anything. **[165]**

THE WITNESS: He didn't do anything.

THE COURT: So he was, in effect, fired and you never got another one.

THE WITNESS: That's correct.

BY MS. BALDWIN:

Q. That was strictly on guilt or innocence.

A. I don't think we ever really defined his role. We met with him one time. We talked about what the case was about. We asked him to do certain things. We were initially focussed on the guilt or innocence phase. We wanted to develop some leads for witnesses and he was supposed—I don't remember who it was. He was supposed to talk to people and he never did it and never submitted a bill or anything like that.

Q. Now, the testimony by Bell's father, Oswald Bell, at the sentencing hearing, and the words that he stated from the witness stand that "if he's guilty, he ought to be punished," is that something you went over with him beforehand and that you wanted him to tell the jury?

A. No.

Q. I mean, how did that come about?

A. I don't know. I don't know what that—I don't know the context of the question. I don't remember it.

Q. Did you ask him or would you have told him beforehand—**[166]**

MR. CONNELL: Objection to leading, Your Honor. The witness said he doesn't remember.

THE WITNESS: No, that's not something I would have told him to say.

MS. BALDWIN: Thank you.

That's all, Your Honor.

THE COURT: Thank you, sir. You may step down and hand those papers back to petitioner's counsel. You may be excused.

Mrs. Baldwin, do you have any further evidence you wish to present?

MS. BALDWIN: We rest, Your Honor.

THE COURT: Is there any rebuttal evidence?

MR. CONNELL: If I may ask for a five-minute recess? There may or may not be rebuttal.

THE COURT: We'll take a five minute recess.

(Recess at 2:10 p.m. until 2:25 p.m.

MR. STEKLOFF: We call Dr. Mark Cunningham.

MARK CUNNINGHAM, CALLED AS A REBUTTAL WITNESS BY PETITIONER, SWORN

MS. HARRIS: Judge, may the state be heard on this witness?

THE COURT: Yes, ma'am.

MS. HARRIS: Judge, we would object to calling this witness. Looking at the affidavits **[167]** provided by Mark Cunningham, it's apparent that

his testimony will speak to the issue of future dangerousness as an aggravating circumstance, specifically what sort of a risk Bell would have been had he been sentenced to life in prison.

THE COURT: I'm sorry. You need to speak up.

MS. HARRIS: What I'm saying is, in looking at the affidavits provided by Mark Cunningham, it is apparent the nature, the character of his expected testimony will speak to aggravating circumstances, specifically future dangerousness in how he would behave or what sort of risk he would be.

THE COURT: Yes, ma'am. I understand what that is and your objection is?

MS. HARRIS: As a matter of law, that is not—Bell's attorney's tried and you've just heard not more than ten minutes ago how Aiken was called as a witness and Judge Hupp would not allow that sort of testimony at sentencing. As a matter of law, they are not ineffective for not providing that sort of information.

Further, Judge, looking at Mark Cunningham's affidavit, you'll see that he never interviewed Bell, never interviewed any third parties. The only thing [168] that he reviewed extensively, according to him, is the report by Alberta Caramus (sic).

Judge, he's not a lawyer. He's not someone who's qualified to speak to what it was that Mr. Williams or Mr. Fischel should have done in mitigation and we would object to his being called as a rebuttal witness.

THE COURT: Any response?

MR. STEKLOFF: Yes, Your Honor.

We are calling Dr. Cunningham as a rebuttal witness and he will actually rebut two points that

were not mentioned by the Commonwealth during that colloquy.

First, he will rebut the argument that it was acceptable for the trial counsel to have their mental health expert serve as their mitigation specialist and mitigation investigator.

Second, he will rebut the argument it was acceptable for trial counsel to present no mitigation evidence at the sentencing stage.

THE COURT: I will overrule the objection. Go ahead. You may proceed.

DIRECT EXAMINATION

BY MR. STEKLOFF:

Q. Dr. Cunningham, can you please state your name and spell your last name for the record? **[169]**

A. Mark Douglas Cunningham, C-u-n-n-i-n-g-h-a-m.

Q. Dr. Cunningham, I very quickly just want to walk through your qualifications. What is your occupation?

A. I'm a clinical and forensic psychologist and independent researcher.

Q. How long have you been a psychologist?

A. About 28 years.

Q. Are you Board certified in any particular area?

A. Yes, sir, I'm Board certified in forensic psychology by the American Board of Professional Psychology.

Q. How many Board certified forensic psychologists are there in the United States?

A. Approximately 220.

Q. How long have you been involved in capital cases?

A. Eleven years.

Q. How many capital cases have you testified in?

A. About 120. Approximately 45 federal capital cases, approximately 75 state capital cases.

Q. And approximately how many capital cases have you been involved in some way in the mitigation investigation process?

A. Over a hundred.

Q. Have you published any articles relating to capital sentencing issues? **[170]**

A. Yes, sir, I have.

Q. Can you, very quickly, describe some of that?

A. Yes, sir. I'm the first author of the chapter on capital sentencing evaluations in the Handbook of Psychology, which is a 12-volume series intended to represent the state of the art of psychology at this time. I have approximately 17 peer-reviewed papers in leading forensic psychology and professional psychology journals, most of those having to do with capital sentencing in one way or another; standards of evaluation at capital sentencing, and considerations of those; violence risk assessment at capital sentencing; death row populations. I also have a number of publications in professional non peer-reviewed journals.

Q. Can you briefly describe for the judge some of the awards you recently received?

A. Yes, sir. I received the 2006 American Psychological Association Award for distinguished contribution to research and public policy, which is an annual award given to a single psychologist for

extraordinary—either single extraordinary research achievement or a lifetime of work. The American Psychological Association is a professional organization of about 155,000 members.

I received the 2005 Texas Psychological **[171]** Association Award for outstanding contributions to science, in recognition of having made a substantial contribution to the body of knowledge in psychology.

I've received other professional awards as well.

Q. How many times have you been proffered as an expert?

A. Over 200 times.

Q. Has the Court ever failed to qualify you as an expert?

A. No, sir.

Q. I'd like to move past your qualifications.

MS. HARRIS: Judge, we would object on the same grounds that we just articulated. Specifically, Mark Cunningham is not an expert on what is and what is not ineffective assistance of counsel. He's not a lawyer. He's not qualified to do that and we would object.

THE COURT: I'll overrule the objection.

Go ahead.

BY MR. STEKLOFF:

Q. Dr. Cunningham, in your view, is it appropriate for a capital defense attorney to have his testifying mental health expert serve as his mitigation investigator?

A. No, sir. **[172]**

Q. Why not?

A. There are two primary reasons. First and most importantly, if the testifying expert or the guy

that's potentially going to testify is the one who's out discovering the information, you lose an important shield in terms of attorney/client privilege, that you need your investigation to be wide-ranging and free to discover all possible aspects of the defendant's background without worrying about what comes before the jury or what aggravating information that person may learn. You need to be able to hold that within attorney/client privilege.

Once you have your testifying mental health expert being the one who's discovering that information first, then as soon as they learn information that is aggravating, you have then burned that expert. Now putting him on risks significant damage to the case. That's the first reason.

The second issue is that you don't know what kind of expert you're going to want until you've done an investigation to see what your primary mitigation themes are. All psychologists or forensic psychologists are not equal in their areas of expertise. You don't know what specific area of expertise you're going to need, whether it's somebody who specializes in reactive **[173]** attachment disorder or male sexual abuse or trauma or abandonment or other issues that may be present. So that as you would go to the Court to seek mental health expertise, that may be with specific capability in mind that would augment what you've discovered in your investigation.

Q. Should the capital defense attorney ever hand off his investigation to his mental health expert?

A. No, sir.

Q. Why not?

A. Because this is a bifurcated proceeding that requires advocacy at both stages. I'm not an advocate. I'm not in charge of the advocacy at the sentencing phase. My role is to evaluate a particular issue or particular issues that are identified for me to focus on. I'm not involved in the strategic decisions associated or in charge of the strategic decisions associated with that second phase of this bifurcated proceedings.

Q. Have you ever involved in a case where a capital defense attorney handed the mitigation investigation off to you?

A. No, sir, nor would I accept that role.

Q. In 2000 and 2001, should capital defense attorneys have known about the concepts you just **[174]** described?

A. Yes, sir, they would.

Q. How?

A. Well, I've been attending five to seven or eight capital sentencing training conferences a year on regional or national levels since 1996. At all of those conferences, the emphasis is on obtaining a mitigation specialist doing a wide-ranging mitigation evaluation, then identifying who the expert is going to be who will speak to those issues, with much attention toward this issue of attorney/client privilege and being free to engage in an investigation without concern of what may be discovered.

Q. I'd like to move to a second area. As a forensic psychologist, how would you describe the general theories of the prosecution and the defense at sentencing?

A. This is a concept that Craig Haney wrote extensively about, Dr. Craig Haney, in the mid

1990's, publishing in the Santa Clara Law Review and Stamford Law Review and here's what he basically described. The theory of the prosecution at capital sentencing typically has two elements to it. One, that the defendant has engaged in the capital conduct through a wholly volitional choice, number one, that arises out of **[175]** his malignantly evil heart, number two.

Now, the response of the defense to those two issues, the defense theory is that the defendant's choices are not wholly volitional, but are the result of formative biopsychosocial forces that have shaped who he is, how he looks at the world and what he chooses. So it's that history of adverse developmental experience that speaks directly to the state's theory that this was wholly volitional.

Then if there are redeeming aspects about this individual, if there are positive relationships that he's had or employment or care of mother or children or others, then those positive characteristic elements go to counteract the state's assertion that this individual is just bad to the bone, that this offense arises from their wholly totally malignantly evil heart.

Should the defense not put on evidence about either of those, then the theory of—the two prongs of the state's theory go unrebutted. There's no argument or evidence that comes before the jury to refute those two positions.

Q. In 2000 and 2001, should capital defense attorneys have known about these concepts you just discussed?

A. Yes, sir. **[176]**

Q. How?

A. Through attending conferences, through reading the literature that they are virtually self-evident. You see these themes emerge simply by reading the proceedings in capital cases.

MR. STEKLOFF: No further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. HARRIS:

Q. Good afternoon.

A. Good afternoon.

Q. You mention in some of your paperwork that you are licensed in a number of states?

A. Yes, ma'am, 14 states.

Q. Virginia is not one of those states.

A. That's correct.

Q. You also mention in some of your paperwork that you never interviewed Bell.

A. That's correct.

Q. And you never interviewed any of the third parties or the players in this case.

A. That's correct.

Q. And is it fair to say that mostly, what your expertise is, is in describing the risk factors of someone's behavior in jail or behavior once they're [177] sentenced to prison. Is that a fair statement, at least for your paperwork, dated June 5 of this year?

A. That's one area of expertise, among a number of areas of expertise that I have.

Q. It's really a focus on violent risk assessment in prison is maybe at the bottom, the way it could be described?

A. Again, that's one area of expertise among a number that I have.

Q. And you're aware that that is not something that's an issue in Virginia anyway?

THE COURT: He's not stated any opinion on that.

BY MS. HARRIS:

Q. Then the second, it seems to me, the second area you speak to and I think you briefly talked about, adverse developmental outcomes equals adverse criminal outcomes. That was the sum and substance of your second affidavit, talking about—in other words, a child who's more deprived, is more disadvantaged has less, I think you said less choice and should have less moral culpability?

A. They have a choice. They don't have the same choice that someone has who grows up under more optimal circumstances. The point is that what happens to you in **[178]** childhood does have a nexus with criminally violent outcome. That's the findings of the U.S. Department of Justice who has become a major sponsor of research in this area.

Q. You also spoke to attorney/client privilege, that would be one advantage of moving away from what is called colloquially the 3:1 one expert, moving away from that. You wouldn't have to worry about attorney/client privilege?

A. No, ma'am, I'm not asserting that someone move away from the 3:1 expert. I'm indicating that if a 3:1 expert is used to do the mitigation investigation, that there are very important constitutional protections that the defendant would have had that are compromised as a result should aggravating information be discovered.

Q. Wouldn't you have that same sort of protection or wouldn't that worry be alleviated by the attorney actually maybe perhaps being the investigator, the one doing the gathering of information that you speak of?

A. If the investigator has sufficient skills and takes the hundreds of hours that are involved to go out and do that, that information, gather that information, that may be satisfactory. The point is, did the attorney proceed to do that.

Q. Then are you aware of the Institute of Law and [179] Psychiatry at UVA?

A. Yes, ma'am, I am.

Q. And the services that they provide—the services they provide?

A. I'm aware that they offer forensic services. I'm not aware of the extent or mechanism of services that they provide.

Q. So you wouldn't be able to say whether or not they acted or they acted inappropriately or appropriately in the services that they provide?

A. Only through my review of Dr. Stejskal's affidavit that he filed regarding his work in that case. That's what would inform me of what he saw his role as and what he undertook to do.

Q. Have you seen their website, by the way?

A. No, ma'am.

MS. HARRIS: Judge, could I show him this?

THE COURT: Is that what you've already introduced?

MS. HARRIS: Yes, it is.

THE COURT: What's the relevance of this? I've admitted it into evidence.

MS. HARRIS: If you could look at it—

THE COURT: What's the purpose of his looking at it, is my question. He's aware of this [180] organization. He doesn't—

MS. HARRIS: I understood him to say he wasn't aware of all the services they provide, that he looked at Dr. Stejskal's—

THE COURT: You can show it to him, but let's move along, please.

BY MS. HARRIS:

Q. I just wondered if you had had an opportunity to see the services that they provide and is that something you think is appropriate, in your opinion?

A. I've not reviewed their website. I'm aware they provide forensic psychology and psychiatry services. Beyond that, I'm not familiar with the particulars of their services.

Q. You say you're not an advocate and—is that right, you're not an advocate?

A. I'm only an advocate for the best available science and for my own opinion. I'm not an advocate on one side or the other in terms of capital sentencing and what happened in the trial.

Q. Would it be fair to say you're not professing to be or representing yourself on the legal standards for defense attorneys in Virginia?

A. I have significant expertise about capital sentencing and have been investigations of mitigation, [181] about psychology relevant to that and about the course of capital cases, through my experience in over 120 cases at trial and by reading extensively in the case law and standards. So I have significant expertise in this arena as compared to the

layman. I am not an attorney who's licensed in Virginia.

Q. And is that different from saying you're not an expert on legal standards for defense attorneys in Virginia?

A. Yes, ma'am, I think it is different. I think my response is distinct from that. The standards for capital representation in Virginia are not unique to Virginia, but are illuminated by landmark case law from the Supreme Court and by capital standards that are national in scope.

Q. Are you aware that mitigation specialists, they're not necessarily required in Virginia, by law?

A. It's my understanding there is not a statutory requirement for the appointment of mitigation specialists. I anticipate that there are many aspects of law in Virginia that are customary for competent practice that are not encoded in the statutes.

Q. But you're aware of that?

A. Yes, ma'am.

THE COURT: Anything further? [182]

MR. STEKLOFF: No, Your Honor.

THE COURT: Thank you, sir. You may step down and this witness may be excused.

Anything further?

MR. CONNELL: Your Honor, at this point, we rest.

For the record, I move for a judgment as a matter of law at this point.

THE COURT: Yes, sir.

I'm going—I'm ready to hear argument in the case. You may proceed with argument.

MR. CONNELL: Your Honor, I will focus my argument on what seems to be the controverted issues. From what I've seen over the past two days, the main issue comes down to, A, did the attorneys in this case reasonably rely on Dr. Stejskal to perform their mitigation investigation; and B—

THE COURT: Don't we have to be precise as possible in this case?

MR. CONNELL: Yes, sir.

THE COURT: Let me tell you what it seems to me.

MR. CONNELL: Yes, sir.

THE COURT: It seems to me that there is—as has been pointed out, there's no express statutory or [183] constitutional requirement, for example, that a mitigation expert be appointed. I'm sure you're not going to argue that. The question is, did these attorneys fall below the constitutional standard in terms of their investigation of the mitigation, available mitigation evidence. So it does seem to me as to whether they relied on him or not, to a certain extent, is not entirely the focus of the case. It's what was done, what did they do. Of course, then if they did fall below that standard, was it prejudicial.

Those are the issues that I have to decide, it seems to me. I think to the extent that we can be as precise as possible, rather than speaking in general terms, it's most helpful to me.

MR. CONNELL: I will approach it from that perspective, Your Honor. Thank you.

The question is, clearly, did these attorneys fall below the standard of reasonably competent counsel, and I just want to acknowledge right at the beginning, all of the—Strickland is the governing

law, Wiggins is the governing law, Rompilla is the governing law. These cases clearly set forth there is a wide range of competent representation, that there's no one thing that everybody has to do or no one individual thing. But what has become clear from the [184] Supreme Court over the last five years, whether that's in Wiggins or Williams v. Taylor or Rompilla, counsel has a duty to investigate mitigation evidence. What Rompilla said that Wiggins and Williams had not said is that that duty to investigate extends to evidence in aggravation of the offense.

The specific question then however, here, is, first—or the sub question is, first, what is the standard. Mr. Cooley, I think very compellingly articulated what he considered to be the standard. When he articulated it, he drew a distinction between his personal opinions about going the extra mile, about having to do the extra work in a capital case and what the core minimum that a reasonably competent counsel has to do. What he said is that first, you have to gather all the documents that are reasonably available and second, you have to interview all the witnesses who know the defendant who are reasonably available.

I think the evidence here has established there are a number of witnesses who are reasonably available who were not interviewed, with extremely relevant points to the mitigation case.

I will begin with Dawn Jones. Dawn Jones herself was a little confused. She thought maybe somebody contacted her, maybe post, maybe before, but [185] Mr. Williams was quite clear on that that he did not contact Ms. Jones and Dr. Stejskal was

quite clear that Ms. Beck did not contact anyone who was not listed in his report. Mr. Fischel was categorical in stating he did not contact any mitigation witnesses. She, I think, is a very good example of what Rompilla is talking about because she, as both attorneys emphasized, was called as a prosecution witness. This is a not a question where there is a strategic decision as to whether or not to call this witness and expose them to cross-examination. This is, was there sufficient investigation to know what the witness had to say that when it came time for the defense attorneys to ask in cross-examination what are the mitigating factors, they didn't know the answers because they had never done the investigation. I think Ms. Jones testified compellingly about her surprise and her shock when they didn't ask her any questions because she had just had elicited from her the worst thing Eddie Bell had ever done in her presence and she didn't get a chance to tell any of the good things.

I think another compelling set of witnesses are Ms. Barbara Bell Williams from Jamaica and also Carol Baugh Anderson from Jamaica. Those two witnesses testified they were fully available, they were easy to reach. They have phone numbers which are dialable from [186] a regular American phone. They have an area code just like any other state. If they had been called on the phone—we're not saying you have to spend a lot of money to go to Jamaica. That's not the standard. But the standard is you have to do the reasonable investigation, picking up the phone and talking to them. Ms. Williams testified she worked at the same place 16 years, she's easy to find. Both of them have a Visa and passport and they would be willing to pay

to come to the United States. They had, I suggest, compelling humanizing evidence to present to the jury.

Another witness who I think was important was Joanne Nicholson. Joanne Nicholson testified not just about the relationship with his children, but she also had specific evidence which rebutted aggravation evidence which was presented by the Commonwealth. The witnesses referred to the notice of unadjudicated bad acts. When they did so, one thing that came up again and again was the groping or fondling or sexual assault is, frankly, the best way to put it, alleged by Billy Joe Swartz against Mr. Bell. What Joanne Nicholson testified was that she was there, she saw what happened and when she did so, it did not happen the way that Billy Joe Swartz said, and that evidence would have been available. **[187]**

In addition to the other things that she had to say about the children, about the relationship and about the lack of domestic violence, which I'll come back to later because I think it's important.

I would also like to mention the employment evidence. What we heard from the attorneys was, yes, the information they had is contained, I believe, in Petitioner's 14, which is a list of here are the jobs that I've worked at. The Attorney General has a number of times referred to a pre-sentence report which was not generated until after the trial took place. Certainly not reasonable for counsel to rely on because they couldn't rely on it. They didn't have it at the time. Instead, what witness testified was, what Precious Henderson testified to was that Mr. Williams had had a job at a temporary agency at

AES. He had gone from there, not fired or anything, but went on to get a new job at Rocco, a chicken packing plant and then he came to work where she worked which was at Southwestern Containers, making Coca-Cola bottles.

It is significant, I think, that when Mr. Williams testified, when he was trying to humanize even the most brief of witnesses, Marjorie Bell, he thought the fact she had children was significant, he thought the fact she had jobs was significant and the same [188] strategies to humanize Mr. Bell could have clearly been used if the investigation had taken place to allow them to make that sort of decision.

The last category of evidence I want to talk about is the other aggravating and mitigating evidence from Jamaica. I know the Court has under advisement how it's going to treat that evidence, but what Ms. Albarus testified was, her essential expert opinion was there was mitigation evidence available. In support of that opinion, for example, Ms. Albarus talked to the person who actually hit Mr. Bell in the back of the head. She talked to the person who witnessed, as he described it, scuffle which led to the conviction which the Attorney General had described as an assault with injuries. Certainly, the Commonwealth Attorney made a big deal out of that, but all defense counsel had was the naked document. No witness to what happened. No witness to Mr. Vinell Thompson who testified that he considered it just to be a matter of principle and didn't even accept the money when it was paid by Mr. Bell.

Those sorts of things—the Jamaican conviction, was used, clearly by the prosecution in the actual

case in aggravation of the offense and because they had not done the relevant investigation, the defense counsel were left without any way to rebut that. **[189]**

Now, that brings us on the second part of any analysis of competent representation, which is the strategic decision. Clearly, the cases have established there can be a strategic decision. A few points that deserve to be made about this.

The first is, in this case, the strategic decision is not a defense for the Commonwealth or Attorney General as a matter of law. What Wiggins established is that there can be no tactical decision without relevant information, without having information which is sufficient unless there's some strong strategic reason to cut off investigation.

I think it is significant and it may have passed unnoticed at the time, but Mr. Fischel testified each time I asked him, was there any investigation you did not do, based on this strategic reason, based on the strategic reason of fear of domestic violence, based on the strategic reason for employment, based on the strategic reason for drugs or Charlestown race track thing, I think it was clear that Mr. Fischel testified that we did not have a strategic reason to stop investigating. There was no investigating that we didn't do for a strategic reason. He was quite clear about that. That is the inquiry under Wiggins, not can an attorney later come up with a strategic reason why **[190]** they did not want to introduce evidence at trial.

The second reason on the facts of this case that the strategic reason is inapplicable as a defense for the Attorney General is that the facts which

underlay these strategic judgments were wrong and would have been rebutted by further investigation. The witness, Mr. Fischel, for example, testified and Mr. Williams testified, we did not want to call any of these witnesses because of the child support issue. It was not the fact that they were out of wedlock. It was not legal status. It was not the fact that he had more than one child that was the issue. It was this child support issue. They didn't call Dawn Jones to find out, does Mr. Bell support his child, and there's no question of a formal child support order which is not being violated. Dawn Jones came and testified to the Court, look, I thought he was doing the best he could. He gave us money. He gave money for the child. He bought what needed to be bought.

With Tracy Nicholson, Mr. Bell was living with her at the time, which counsel acknowledged. Certainly there's no need to pay child support to a child who lives with you. I don't pay child support for my own child.

With respect to Barbara Williams, there was [191] a great deal of evidence from Ms. Williams that Mr. Bell sent money back to support her, that he sent—he sent money back, for which she was very grateful, from the United States.

The same rational applies to the other strategic reasons cited by the two trial counsel.

With respect to domestic violence, for example, they said they didn't want to elicit evidence from these women because of the specter of domestic violence. In fact, what the actual testimony came out to be was that Joanne Nicholson, who lived with Tracy Nicholson and Mr. Bell for three years, testified there was no domestic violence during that

time. The only evidence of domestic violence was from Mr. Williams himself who said that Tracy Nicholson had told him, yes there were some issues with domestic violence. However, she minimized them and she said they were not very significant. He was somewhat abusive at times and it was not a regular thing.

THE COURT: Dawn Jones testified here that there had been some domestic violence.

MR. CONNELL: That's true. She did, Your Honor.

THE COURT: She testified Mr. Bell had hit her three or four times over a five-year period. **[192]**

MR. CONNELL: That's correct, Your Honor.

I think what may be significant about that is the most significant part of domestic violence, the carrying of the firearm, was elicited by the prosecution and it certainly wasn't going to get any worse than that.

I think that's related to the third point that I'd like to make with respect to the strategic reason, which is that by the time counsel were in a position to present mitigation, the nightmares they cite had come true for them. They said they didn't want to invite a comparison with Mrs. Timbrook's, son which had been testified to by multiple witnesses by that time. At that time, it would not be defense counsel introducing evidence to raise the issue of children. At that time, it would be the defense rebutting aggravating victim impact testimony. Unfortunately, they weren't prepared to do that because they hadn't done the proper investigation.

The same is true with the evidence of drugs. The same is true—because that had been extensively

litigated during the trial. The same is true with the evidence of multiple partners. All of Mr. Bell's partners had been solicited by the Commonwealth throughout the trial. [193]

The fourth issue I want to make about the strategic decision, fourth and last point I want to make about the strategic decision is the question of, at some point, even if these strategic decisions were entirely legitimate, entirely valid, at some point, there has to be some mitigation evidence. What Mr. Cooley testified to compellingly was that consistent with professional norms of reasonably competent counsel, even if there are two good things a witness has to say and four bad things a witness has to say, you still have to put on some evidence. The 1989 guidelines, which we haven't spent much time talking about, say that it is required for reasonably competent counsel to put on a mitigation case unless there are strong strategic reasons not to do so and the strategic reasons we've heard advanced by the Attorney General here certainly do not rise to that level.

What the rebuttal witness, Dr. Cunningham, testified to was in support of what Mr. Cooley said, which was at the end of the day, the Commonwealth has a narrative, if you will—I sometimes use the word story—but a narrative, that Mr. Bell is a terrible person who acted malignantly out of an evil heart and the jurors want to know, is there anything good about him. That's what Mr. Cooley testified. At the end of [194] the day, the attorneys left the jury with no choice other than to accept the narrative of he's the worst person you have ever heard of because there's not a single person to speak on his behalf.

I think the evidence that was actually put forward by the attorneys is quite compelling on that. I won't rehearse it because the Court has recognized that clearly, but the two witnesses who were not called—who were called, not only said nothing about Mr. Bell, but in many ways, they were damning to him, either because his crime has had an impact on my family, for Marjorie Bell or if he's guilty, you should punish him, for Oswald Bell.

That brings us to the second prong of the Strickland, Wiggins analysis, which is question of prejudice. I think the Court has heard enough today and yesterday enough evidence to clearly conclude that given the lack of any mitigation presented by the defense in the case that the sort of things that we have heard here would be sufficient to create a different outcome or at least a reasonable probability of a different outcome. What we have heard is about a human being with people who love him, who love other people, who now—does any of this excuse him? Does any of it mean he didn't do this terrible crime? No. **[195]**

I think it's also significant in this prejudice analysis that the bulk of the evidence that we have suggested should have been presented which was not investigated and could have been, is in no way inconsistent with a vigorous defense in the guilt phase. In the guilt phase, on a circumstantial case, the defense attorneys argued that what we tried to do is circumstantial case, we tried to poke holes in it, raise a reasonable doubt. There's no inconsistency on the one hand between Mr. Bell did not commit this crime and on the other hand, not only did he not commit this crime, but in fact, he is not a bad person, he has redeeming qualities, the second part

of the analysis that Dr. Cunningham testified. It might be inconsistent to say he did not commit the crime and then later to say he committed the crime because he had been hit on the head. That would be inconsistent. But to say he did not commit the crime and he has redeeming quality are in no way inconsistent.

I would suggest to the Court this is a case in which 2254 habeas relief is warranted and unless the Court has any questions, I'll yield at this time.

THE COURT: Thank you very much.

Ms. Baldwin?

MS. BALDWIN: Thank you, Your Honor. **[196]**

We have to start with the standard. I know you said you wanted to hear specifics, but we have to because the standard that has been argued that you've just heard is incorrect. To say that an attorney has to put on mitigation is simply not the law. No Court has ever said that. What Strickland said and what Wiggins said and what all the cases have said since then is that strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

The question is not was there something else that an attorney could have done here? Was there other evidence that could have been presented? That's always the case. The question is what counsel did in this case, was it reasonable or was it unreasonable. In fact, I submit that's not even the question before

this Court. The question before this Court is under 2254D. The question before this Court is a double layer of deference. The Strickland deference and then the deference to the Virginia Supreme Court's decision and the Fourth Circuit has made that abundantly clear. You **[197]** are talking about not even reviewing this de novo. You ultimately are deciding whether the Virginia Supreme Court's judgment was reasonable or not.

Now, Strickland, obviously, has the two standard approach. First of all, Rompilla has absolutely no applicability to this case. Rompilla was a case that involved a failure to investigate aggravating evidence that was being put on. So the defense counsel was not even prepared to meet or even know about what the aggravators were. Clearly, the evidence in this case shows that that's not the case. The attorneys here knew about it.

The shirt-tearing incident, it is clear from the trial record, trial counsel knew about that and actually cross-examined and impeached the witness at trial. On that very point, the witness admitted yes, it was a mere shirt tearing, when, in fact, it actually wasn't. It was actually also an assault. But on cross-examination, he admitted, yes, it was just a shirt-tearing incident. Trial counsel in this case knew about the aggravators. Rompilla has no applicability here.

What does have applicability here is binding Fourth Circuit law. If you look, in particular, at the case of Lovitt v. True, which was a post Wiggins case, a **[198]** case where not even a 3:1 expert was asked for, where witnesses were not examined or put on, where there was—the attorneys knew something

about the family, so they didn't even bother asking or interviewing any of the family, and that was a case where trial counsel were found to have been effective and that's been upheld through the United States Supreme Court. The reason why is because it's case specific. You have to look at what are we faced with.

If there was ever a case before the Virginia Supreme Court and before this Court where you can say that Strickland v. Washington shows that counsel were not ineffective, it's this case. You can do that on prejudice alone. Because in this case, and as you've heard very thoroughly—

THE COURT: If you want to talk about prejudice, tell me, assuming that the counsel's performance was constitutionally deficient, why was it not prejudicial?

MS. BALDWIN: It would be the petitioner's burden to prove, if you were looking at this de novo, petitioner's burden to prove that there's a reasonable probability that the jury would have given Edward Bell a life sentence. What we're talking about here and the evidence before the Court is that the circumstances at **[199]** the time—we can't Monday-morning quarterback on this. We have to give a high measure of deference to what happened and the circumstances at the time.

What were the circumstances at the time? Not years later when witnesses come in here and say what a wonderful, loving guy Edward Bell was. But what were the circumstances then? You had witnesses who generally didn't want to be called, Joanne Nicholson. You had—

THE COURT: Wait a minute. The testimony about that is she didn't want to be called because she wanted to listen to the evidence.

MS. BALDWIN: She didn't want to testify is what she didn't want to do. That's the evidence before the Court. She did not want to testify like she came in and you heard now, years later.

THE COURT: No, no, no, Ms. Baldwin. She testified—counsel testified that she told him that she did not want to testify. Then I asked counsel why and he said, well, she wanted to listen to the evidence so she couldn't be a witness and listen to the evidence at the same time.

MS. BALDWIN: Your Honor, you heard no evidence whatsoever that said that Joanne Nicholson tried to give that story that you heard from the stand to trial counsel. But you did hear evidence that trial **[200]** counsel interviewed her, that they were assisting them with mitigation.

THE COURT: I got you off the track, Ms. Baldwin. I guess what I was interested in, because you brought it up is, you said even on prejudice alone, this case—petitioner is not entitled to relief. I'd like you to elaborate on that. Obviously, it's a little bit of a puzzle as to how you determine that. The state objected and I granted your objection to calling any jurors. So we can't know from the jurors their after action report of what would have made a difference to them and I agree with you in that regard. So how do I make that determination?

MS. BALDWIN: I think you have to look at the cases. You have to look at how the Fourth Circuit has handled it. You have to look at the how the

United States Supreme Court has handled that particular issue. What they've done in those cases is they have looked at the circumstances of the crime, the background of the defendant and you make an independent assessment of the case, in essence, as if you were a reasonable juror, not one particular one, but a reasonable juror, hearing the evidence.

THE COURT: I tend to agree with you. Here, the situation is this. You'll agree that there was zero **[201]** mitigation evidence presented in this case. The brief testimony that was presented, again, as I think the witnesses have agreed, really probably hurt Mr. Bell more than they helped him. Certainly those witnesses, there was nothing elicited from them that did anything to shed any light on Mr. Bell or his character or motives or background.

MS. BALDWIN: As Mr. Fischel said, witnesses surprise you. You did have the sister who described that he was from Jamaica, from a large family. You do have that. But I agree, and that's because there wasn't any mitigation in this case.

THE COURT: But that's not accurate, is it? We've heard several witnesses who testified that he was a good father, that he was a loving husband, that he did some good things. Whether you believe that or not, I don't know.

MS. BALDWIN: Let's take that as fact.

THE COURT: Let me talk and then you can talk.

How do you say then that there was no mitigating evidence? Isn't it clear that there was some? The lawyers either didn't know about it or simply decided not to present.

MS. BALDWIN: Yes. There was evidence which **[202]** an attorney could have taken this case and

tried it a different way. Absolutely. That's the case in every case that I've ever seen. So yes, you could have had a case that could have been tried the way Bell's current habeas counsel are saying it could have been tried. They could have come in and presented, and let's assume they presented the witnesses and they testified exactly the way they testified before Your Honor. What I'm saying is, you can take all of that and it amounts to nothing in this case because of who Edward Bell was and because of the crime that he committed and because of the circumstances. It was a small community. It was a beloved honored police officer. It was a brutal, premeditated, horrific crime which was precipitated by Edward Bell making threats that he was going to kill this police officer, by Edward Bell, on more than one occasion, to more than one witness. Extensive evidence of his drug dealing, and that he was—in fact, when he was caught, he was caught with the drugs, with the gun. Extensive evidence of him having firearms, not just in Virginia, but in West Virginia when he was stopped—well, I believe it was another traffic stop with a gun in VirginiA. But he was stopped—I believe there were two instances in West Virginia, one of which he gave a false name. Ended up, there was a knife in the car and **[203]** they had to go on a chase for him. In other words, I'm talking about a person with no respect for the law. We're talking about a person with no respect, obviously, for human life, and we're talking about a person who—and there's no mitigating evidence that exists in this case that could have in any way give any court the ability to say there's a reasonable probability that a life sentence would have been entered for a person who was in the process of being

deported, a person who had a prior concealed gun conviction, a person who had, like I said, numerous instances of direct threats against this person, against his ultimate victim. And then the circumstances of the crime itself were so horrendous where this police officer who had not even unholstered his gun, who is running after him and telling him to stop and in cold blood, turns around and shoots this officer in the head, as he had promised that he would do.

So that's the facts that the jury had. None of the mitigating evidence that Your Honor has heard counters that in any way, shape or form.

THE COURT: Why did the prosecutor in this case emphasize the fact there was no mitigating evidence then to the jury?

MS. BALDWIN: It was fair argument. There **[204]** wasn't any.

THE COURT: Exactly, and that was important, apparently, to the prosecutor when he argued to the jury. He mentioned it several times.

MS. BALDWIN: You certainly can't fault counsel for that argument. We're talking about a claim of investigating and presenting evidence and then faulting him because a prosecutor characterizes the evidence?

THE COURT: Ms. Baldwin, I'm not faulting counsel for the prosecutor's argument, but what my statement means is, you're arguing that it would not have made any difference. If all of the mitigating evidence that's been presented by the petitioner now had been presented to that jury, it would not have made any difference, they would have still voted to send him to death. My question to you was, why

then did the prosecutor rely on the fact that no mitigating evidence was presented and seemed to be important in the prosecutor's statement?

MS. BALDWIN: Because it was fair argument on the evidence in the case.

THE COURT: It certainly was absolutely because there was no mitigating evidence presented.

MS. BALDWIN: It was certainly fair to **[205]** characterize it that way.

THE COURT: I agree.

MS. BALDWIN: But that doesn't mean that counsel were ineffective in what they investigated, what they presented.

THE COURT: Ms. Baldwin, we're on the prejudice prong right now. I haven't moved necessarily beyond that. What I wanted to get you to discuss was the prejudice prong to assist me in reaching a decision there.

Your argument seemed to be that it doesn't matter. No mitigating evidence that these lawyers could have presented would have made the slightest difference in the ultimate outcome.

MS. BALDWIN: Nothing that we've heard, nothing that has been pled, presented and proved.

THE COURT: You say that based on the aggravating circumstances of this crime, correct?

MS. BALDWIN: Well—and of Edward Bell's character that was proven at trial, to which the mitigating evidence that you've heard did not go to. In other words, his threats, his prior record, his prior disrespect for the law and human life, his assaults against women, and I don't care how it's characterized, his abandoning a wife for another woman in this country. **[206]** The reports show that

all his sisters said, in other words he may have been a good boy in Jamaica, but he changed when he came here. He became a drug dealer with no respect for the law and a person who had no respect for life or even the girlfriends that he lived with and he did not provide financial support. He may have given them gifts, but there was no evidence here that he was providing financial support for these five children. That was their burden to prove that and I don't think they proved that.

Look at Wiggins. Wiggins is a case where the United States Supreme Court found prejudice and look what it took, and this is the type of evidence that it takes, the type of evidence that makes a difference. Evidence that is so horrendous, that is so mitigating, such as terrible sexual abuse, physical abuse as a child, horrible neglect, those are the cases that say, yes, you can say with confidence there's a reasonable probability of a different result because even with a horrible crime—and by the way, in those cases, there was no record of the defendant either. There was also indication that they were mentally retarded. There was a wealth of mitigating evidence that does not exist in this case. This case does not fall in that group of cases, not in the cases from the United States Supreme **[207]** Court and especially not from the Fourth Circuit that have found that counsel were ineffective.

In a case where the attorneys interviewed witnesses—not every witness—I've never seen a case where they did. Even Mr. Cooley said, here's what you're supposed to do at a minimum—

THE COURT: Come on, Ms. Baldwin. You can't seriously tell me that the attorneys acted properly in

this case by failing to contact their witnesses, failing to contact his wife.

MS. BALDWIN: In Jamaica.

THE COURT: Yes.

MS. BALDWIN: They knew about her. The sisters told them about his life with her. They knew he had a child with her and he was a good father. They knew that. There's not information—

THE COURT: If you believe, Ms. Baldwin, that the failure to even attempt to contact your capital defendant's former wife, who is available to you through a telephone call, is somehow excusable, I just respectfully disagree.

MS. BALDWIN: I accept Your Honor's opinion on that. I disagree with it. I disagree with it and it's not me personally disagreeing with it. I think the case law disagrees with it because you have to look at **[208]** the whole picture. You have to give deference to the whole circumstances counsel were in and what they did do. And what did they do here? They went to a group that is one of the most renowned forensic mitigation providers and they got a report that if you hold that side by side with Ms. Albarus' report, put them down together, one has more pages, but there's no difference between the two reports. So what they tried to find out, you can't find ineffectiveness for the investigation stage in this case, I submit. It comes down to whether you agree or disagree with their trial strategy. You have to—it's not that you have to find that you agree or disagree with it. It's that you have to find that it was unreasonable in light of all the circumstances and giving deference to it.

I think that it's very important, the strategic reasons that counsel gave you and that you heard about being inconsistent between guilt and sentencing, and I know Mr. Cooley disagreed with that and Mr. Cooley is wrong on the law on that.

THE COURT: Tell me what your view is of that, Ms. Baldwin. Do you believe—is it your view that it is proper then in a capital case if it is contested on guilt or innocence, that counsel, in essence, once having lost on that issue, should not **[209]** present any mitigating evidence?

MS. BALDWIN: You can't—there's no rule. What I'm saying is that can be a reasonable tactic and strategy, and here's why; because the United States Supreme Court has said it and because the Fourth Circuit has said it in Lovitt.

THE COURT: That's not what the Supreme Court said. What the Supreme Court said was, quoting an expert in the field, Mr.—or Ms. Lion, was that you can't put on a "he didn't do it" defense and a "he is sorry he did it" mitigation. That's not what was appropriate here or what is normally used in most capital cases. That certainly would be inconsistent. But it's certainly not inconsistent to put on a vigorous defense and then say, ladies and gentlemen, you have found the defendant guilty, but here's information about the defendant for your benefit and use in arriving at a judgment. What is inconsistent about that?

MS. BALDWIN: Once again, I'm saying it would be perfectly reasonable for an attorney to do that.

THE COURT: So that's a red herring in this case. There is no claim by these attorneys that they were going to somehow put on—they didn't want to

put on a "I didn't do it defense" and then say "I did it but **[210]** I'm sorry mitigation." That's not involved in this case.

MS. BALDWIN: I think that's what Mr. Fischel testified to exactly.

THE COURT: If that's true, that's wrong. He didn't have that choice. That isn't the choice. It isn't a choice between saying, I didn't do it, and no mitigation. What the Supreme Court was talking about is a choice between saying, I didn't do it, and then after the jury finds you guilty say, oh, I did do it, but I'm sorry I did it.

MS. BALDWIN: I think if you read Flory v. Nixon, the facts of that case—

THE COURT: Yes, I've read it.

MS. BALDWIN: I think they are in line with what I'm talking about. Although you're not going to stand up to the jury and use the words, okay, I did it. In essence, it's called the abuse excuse. Yes, we just told you he didn't do it, now let me tell you why you should give him a life sentence because I want you to feel sorry for him. That is, in essence, an admission that he did it because otherwise, why are we discussing that? That's what I think these cases are talking about. I understand you disagree with me on that, but I think it's a perfectly reasonable defense and perfectly **[211]** reasonable strategy.

THE COURT: Under your view then, any time no mitigation defense was presented after a not guilty defense in the guilt or innocence phase, then the answer would be, well, that was just our strategic decision.

MS. BALDWIN: No, and I've said that now a couple times. That is not the position I've taken.

Every case stands on it's own. If they are nothing else, ineffective counsel claim cases are fact specific. What I am saying is in this particular case, to say that to have his ex-wife who, you have to remember, at the time she would have been called as a witness to his trial, would have been not that long after he had left her for these other women and had children with these other women. And to say that you could put her on the stand, to say that he was a good guy in Jamaica or to say that anybody else you could put on the stand to say that he was a nice person in Jamaica, and to think that the prosecutor would not have just used those witnesses, as trial counsel told you, used those witnesses to go through the whole litany again of everything bad that Edward Bell had done and to compare what he had done. For instance, put on witnesses to say that he loved police officers, that he thought and respected them well? I would have loved to have been the prosecutor in **[212]** that case and what I would have done with that, with this entire body of evidence of what he did to police officers here, culminating in a brutal murder. That's one example.

The wife, bring her here. You think that you would not have been able to question her before that jury and then argue later that, well, it's nice that Edward Bell can have this loving relationship with his children while he's murdered this police officer who never even gets to see his own child. That's another example.

You can go on and on in this case and it all comes back to who Edward Bell is and what his actual character was, as demonstrated by the facts and that would have been used over and over and over. The classic way that courts find counsel are not

ineffective is when they either don't investigate, don't talk to or don't present witnesses that have the double-edged sword part to them. On that, the courts have spoken with one voice, Strickland, Wiggins, on down.

THE COURT: How could it have been any worse? You're saying that it was okay for them to risk this perceived double-edged sword and the remedy was, don't present any mitigating evidence.

MS. BALDWIN: That's not the standard, Your [213] Honor.

THE COURT: My question to you is, how could it have been worse?

MS. BALDWIN: I'm sorry. I'm not avoiding your question. What I'm saying is that doesn't have an answer in the legal standard because we don't care how it could have been any worse. We don't care if another attorney might have done something different. The question is, was it professionally unreasonable for them to have done what they did in this case.

THE COURT: That's right. I think my question is relevant to that question.

MS. BALDWIN: And was it actually prejudicial.

THE COURT: Could it have been any worse?

MS. BALDWIN: Could what have been any worse?

THE COURT: What they did, which was to present no mitigating evidence, zero mitigating evidence. The prosecutor said it, you agree, I agree. The defense counsel presented zero.

MS. BALDWIN: Given what could have happened to the witnesses that could have been presented, it could have been worse.

THE COURT: You mean, there's something [214] worse than death?

MS. BALDWIN: I thought the question was, how could it have been any worse—I think it could have been made worse if they had presented this evidence, is where I'm going with this. I think you heard that from the attorneys today.

THE COURT: You mean the jury would have been madder and more likely to impose the death penalty when they heard that he was a good father and he loved his children and he had these sweet children and he wrote them letters. That would have been worse because it would have come out that he had several wives or girlfriends. It would have been worse than presenting zero mitigating evidence and just letting the jury focus on the fact that this was a heinous crime, which it was.

MS. BALDWIN: Yes, because of what the Commonwealth would have done with that, would have, they would used that evidence to it's own benefit.

THE COURT: I appreciate your candor. Is there anything else, Ms. Baldwin?

MS. BALDWIN: No, Your Honor.

THE COURT: Thank you. I'll hear a brief response.

MR. CONNELL: There are three points I'd like to make. The first is every capital case is [215] clearly horrendous. It would not be eligible for the ultimate sanction in Virginia if there were not. Some have two aggravators instead of one. Some have a defendant with a prior felony conviction. Some have sexual violence. Nonetheless, it is an

attorney's duty to investigate and present evidence to a jury in mitigation.

Clearly, we heard from Mr. Fischel sometimes that evidence makes a difference. He testified in his case where a person had slit someone's throat and sat down and done drugs in the bedroom and received a life sentence. Clearly, simply the horrendousness of the case is not the answer to prejudice.

The second point I'd like to make is a legal one. The Attorney General is incorrect that ADAPA deference applies to the preference prong. The case of Monroe v. Angelone of the Fourth Circuit held where as here there's an evidentiary hearing not barred by 2254(e)(2), and there's additional evidence which was not considered by the state court, then a de novo standard applies, rather than ADAPA deference.

The third point I'd like to make is that the Attorney General eventually retreated to the position of well, it's all about what the Commonwealth would have done to those witnesses. Frankly, Your Honor, I'd like **[216]** to suggest that we saw over the past two days what the Commonwealth would have done to those witnesses, which was just repeat the exact same things which they had already said in aggravation. I could not agree with the Court more, it could have not gotten any worse. This was worse than no mitigation. This was calling two witnesses to say the crime had had an impact on the family and if he's guilty, punish him.

Thank you.

THE COURT: Thank you, Counsel, for your presentations. We're going to take a brief recess while I consider my decision in this case.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division

EDWARD N. BELL,	Civil Action No. 7:04cv00752
Petitioner,	
vs.	Harrisonburg, Virginia
WILLIAM PAGE TRUE,	July 6, 2006
Respondent.	

TRANSCRIPT OF COURT'S RULING BEFORE
THE HONORABLE JAMES P. JONES,
UNITED STATES CHIEF DISTRICT JUDGE

* * *

[2] THE COURT: Thank you, Counsel, for your presentations. We're going to take a brief recess while I consider my decision in this case.

(Recess at 3:30 p.m. until 4:00 p.m.)

First, I want to thank counsel for their efficient presentation of the evidence over the last two days. I think counsel on both sides acted in the highest tradition of the legal profession and I want to thank you all.

The following will be the Court's findings of fact and conclusions of law.

The essential historic facts and procedural history of this case is set forth in my earlier opinion, dated February 7, 2006, and I will not repeat those facts or history.

I base my factual conclusions on my opportunity to observe the witnesses and make judgment about their credibility, as well as my review of all of the evidence presented.

To establish ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Without articulating specific guidelines for appropriate attorney conduct, the Supreme Court has explained that **[3]** counsel's performance is deficient where it falls "below an objective standard of reasonableness" as measured by "prevailing professional norms." Wiggins v. Smith, 539 US 510, 521, 2003.

I, thus, must judge the reasonableness of the conduct in this case on the facts of this particular case viewed as of the time of counsel's conduct.

Assuming that the petitioner establishes that counsel's performance was deficient, then he must prove prejudice, i.e., "that there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different." Wiggins, 539, US, at 3534.

A "reasonable probability" refers to a "probability sufficient to undermine confidence in the outcome." In making this determination, I am required to "reweigh the evidence in aggravation against the totality of available mitigating evidence." That's also a quote from Wiggins.

That means, of course, in simpler terms that I must first determine whether the lawyers here representing Mr. Bell were deficient, acted below an objective standard for reasonableness in regard to their conduct in connection with the mitigation

phase of Mr. Bell's trial and if I find that it was unreasonable, [4] judged by that standard, I still must determine whether it has been shown that there was prejudice; in other words, that there would have been at least a reasonable probability that there would have been a different result.

Based on the evidence, I do find that counsel's investigation of the mitigation evidence available to them in this case was deficient within a constitutional standard. The evidence show that there were several witnesses, all of whom who testified before me, who would have had mitigation evidence to present had they been adequately determined and investigated by counsel. Dawn Jones, for example, who testified, now Dawn Jones Bailey, testified that she would have been available to testify about favorable aspects of Mr. Bell's character concerning his treatment of his children or his child, at least, as to Ms. Jones; that he was otherwise a good father. While there was some question as to whether she was contacted by defense before trial, I find from the evidence that she was not. Had she been contacted, not only would she have had mitigation evidence to present that would have been relevant, but she would have been available in regard to other factors in the case. Of course, she was a witness for the prosecution. Counsel was unable to effectively [5] cross-examine her because they had not interviewed her prior to trial.

Barbara Bell Williams, Mr. Bell's former wife, of course, also was available to testify had she been found and interviewed. She could have come to the trial. Had a Visa and passport and would have testified that Mr. Bell was a loving, decent and hard

working person when she knew him in Jamaica; that he wrote to his daughter and was otherwise a good father.

Carol Baugh Williams would likely have also been discovered had an adequate investigation been made and she would have, likewise, had helpful things to say about Mr. Bell's character. She also, of course, was not discovered or interviewed by defense counsel.

Joanne Nicholson did not testify, although she had been interviewed by Mr. Williams, one of the defense counsel, but not asked to testify. She, likewise, would have been a helpful mitigation witness, not only to talk about Mr. Bell's quality as a father to her grandchildren, but the fact that in her view at least, he had no experience of domestic violence. She would have also been available to rebut the testimony introduced by the prosecution concerning the incident with Mr. Bell's girlfriend in which he made a sexual assault, allegedly. The fact that she indicated to [6] counsel that she would rather listen to the evidence than testify is really no excuse for not considering her as a witness where she would be subject to subpoena. There is no indication that she was hostile to Mr. Bell or would have otherwise testified differently than she did in these proceedings at trial.

Precious Henderson, from West Virginia, who was a Jamaican native who knew Mr. Bell and helped him get a job, would also have been available in a proper investigation to testify concerning his work situation, although she, in my opinion, would have been of lesser importance than these other witnesses.

Now, the explanation for not calling these witnesses is, of course, that there was a strategic decision made, that as Mr. Williams testified, that any evidence relating to Mr. Bell's relationships with children or with wives or former girlfriends would be a so-called double-edged sword because the prosecution would have been able to make something out of it because of the alleged failure of Mr. Bell to regularly support these children.

Mr. Williams also indicated that he felt that there was also the ground that would show a lack of moral fiber with Mr. Bell because of these multiple relationships, although lead counsel in the case, of [7] course, indicated that that was really not a consideration in making the decision that this evidence would not be presented, that it was a child support issue.

However, strategic decisions have to be based on adequate investigation and counsel had an obligation to adequately investigate evidence in mitigation of guilt. One cannot make a strategic decision absent knowledge of the facts and the facts here were not uncovered through, in my view, deficient performance of counsel.

It is apparently, and I so find, that really, the mitigation aspect of this case was left to Mr. Williams. Mr. Williams was not experienced in capital cases, although he had prior criminal trial experience. This was his first capital case. Of course, he had never handled a capital mitigation case before, but it was left to him to develop this mitigation evidence and he, in turn, relied upon Mr. Stejskal, Dr. Stejskal, and his organization, and I've had an opportunity, of course, to hear evidence from

Dr. Stejskal, as well, and I find as a matter of fact that it was unreasonable to depend upon Dr. Stejskal to do an investigation of the nature required. Dr. Stejskal certainly did not indicate that he was going to [8] undertake any such full investigation and his report which came not too long before trial certainly doesn't indicate that. He did, in fact, develop some potential witnesses. But again, for the reasons I've indicated, counsel really made no effort to follow up and interview these potential valuable witnesses.

As counsel for the petitioner has argued, much of the so-called double-edged sword evidence had already been presented in the state's mitigation case. It was already before the jury and thus, a decision based on a fear that this evidence would be -- would thus come to the jury through these mitigation witnesses was unfounded.

It certainly is true that, as the state argues, that the prosecutor would likely have argued that these mitigation witnesses were not to be credited or showed a contrast of Mr. Bell's lack of moral fiber, but the choice that came to counsel because of their inadequate investigation was simply to put on no mitigation evidence at all, which is what, in fact, they did.

Now, I have had taken under advisement the petitioner's request to consider report of their mitigation expert, Ms. Albarus, as well as the affidavits obtained by her and counsel in Jamaica. I [9] decline to consider that evidence and instead, rely on the live witnesses that were presented to me. While it is true that the habeas statute permits the Court to consider affidavits, in this case, I think it

would be not proper to do so because counsel for the state is severely disadvantaged by their inability to cross-examine these witnesses. Whether or not these persons would have been available, for example, to actually have come to trial is not apparent and frankly, would be an important element subject to cross-examination by the state. Even if the Court accepted they had some good things to say about Mr. Bell's character, whether they would have been available to say those things at the time is important and I believe that without the opportunity to cross-examine them, it would not be proper and I decline to entertain those exhibits and will refuse them, as well as the report of Carmeta Albarus, which report contains lengthy recitations of this purported testimony.

The fact that I have concluded as I do, that counsel was constitutionally deficient in their failure to adequately investigate and present mitigating evidence in this case does not end the matter. I must determine that there's a reasonable probability but for these errors that there would have been a different **[10]** result. To do that, I must weigh the evidence in aggravation against the totality of available mitigating evidence. In this regard, I have determined that prejudice has not been shown.

This was a very difficult case from defense counsel's point of view. I have carefully considered it. While I find that counsel should have done more in presenting this mitigating evidence, I have to say that based on all of the evidence presented, I believe that the jury would have arrived at the same verdict of death, even had this mitigating evidence been presented. Based on that determination, upon a

review of all of the evidence in the case, I will deny the petition for habeas corpus and deny relief.

If a notice of appeal is granted, I will grant a certificate of appealability as to this issue. I will enter a final judgment in accord with the Court's decision.

We'll adjourn court.

(Proceedings concluded at 4:25 p.m.)

* * *

[Petitioner's Hearing Exhibit 10]

Mark B. Williams
Attorney at Law
7 Wall Street
Warrenton, Virginia 20186

Telephone
(540) 347-6595

Facsimile
(540 349-8579)

MEMO

DATE: July 21, 2000

TO: Jud Fischel

FROM: Mark B. Williams

SUBJECT: Mitigation

COMMENTS:

After interviews with the client, sisters and his mother, it appears as if there is little evidence that would assist in mitigating the case against Eddie Bell.

The Defendant, 35, is one of 14 siblings, 9 sisters and 4 brothers. He is the youngest of the brothers. Bell grew up in Portland, Jamaica, 75 miles from Kingston. He finished the 10th grade (which in Jamaica is the last year of high school). There were no childhood illnesses or diseases of significance. He related that when he was about 6 years old, he suffered a head injury that required hospitalization

for about a week. This was verified by his mother. Bell said that he began smoking marijuana and drinking rum on a daily basis at the age of 8 or 9. These substances were given to him by older men. He has no criminal record in Jamaica.

Bell's father came to the United States in 1980 as an agriculture worker. He came in 1992. Bell has worked in a variety of laborer jobs since coming to the United States.

According to the family and after interviewing Bell's mother, it appears she suffers from Alzheimer's disease. However, she stated that Eddie was her favorite child. He was always helpful and attentive to her needs.

Bell's sister, Donna Lindsay, went to Jamaica last week. She will try to get any school or other records available.

[Petitioner's Hearing Exhibit 11]

JUD A. FISCHEL, P.C.
ATTORNEYS AT LAW
24 ASHBY STREET
WARRENTON, VIRGINIA 20186-3236

TELEPHONE: (540) 347-1011
FACSIMILE: (540) 347-1033

Of Counsel:
Merle W. Fallon*
Richard W. Groux, Jr.
*Also admitted in DC

September 8, 2000

Mr. Edward Bell
Clarke, Frederick, Winchester Adult Detention Center
141 Ft. Collier Road
Winchester, VA 22603
Legal Mail

Dear Eddie:

As we have explained to you before, a capital murder trial is divided (bifurcated) into two (2) parts. The first is a traditional trial by jury as to guilt or innocence.

The second part occurs only if the defendant is convicted of capital murder. If so, a mini-trial is held and the jury decides whether to recommend the death penalty or life in prison without parole.

As part of our case during the sentencing trial we are entitled to present evidence in mitigation to the death penalty. In order to fully and properly prepare

for a Sentencing Hearing you are entitled to the professional services of a mental health expert.

In this case, Judge Hupp has appointed William J. Stejskal, Ph.D., a clinical psychologist. He has prior experience in conducting an investigation and analysis for this type of case.

As you can see from the enclosed copy, Mark and I will be meeting with Dr. Stejskal in the near future. I doubt we will be at the Adult Detention Center to introduce him to you when he comes to see you. So, I am writing this to alert you, to advise you that he has been appointed to help you and us, and to tell you it will be beneficial for you to work closely with him.

Obviously, if you meet him without Mark or me present, you should request to see photo identification.

Finally, do <u>not</u> take our preparation for the penalty phase of the trial as any suggestion that Mark and I have lost faith in the guilt/innocence portion of the trial. We must prepare for all possible results as to innocence or guilt. If we do not start now, we will never be properly prepared for trial.

Very truly yours,

/s/ Jud Fischel
Jud A. Fischel

JAF/tml

cc: Mark B. Williams, Esquire

William J. Stejskal, Ph.D.

[Petitioner's Hearing Exhibit 13]

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Of Counsel:
Merle W. Fallon*
Richard W. Groux, Jr.
*Also admitted in DC

Jud A. Fischel

TO: Mark B. Williams, Esquire

FROM: Jud A. Fischel

RE: Bell Sentencing Materials

DATE: May 21, 2002

1. Enclosed please find the following:

a. Pre-Sentence Report dated May 18. 2001

b. Victim Impact Statements

Kelly Timbrook, wife
Kitty Timbrook, mother
Richard Timbrook, father
Kim Hudson, sister
Sherry Fout, sister-in-law
Vickie Wisecarver, mother-in-law

Jerry L. Wisecarver, father-in-law
Wendy Wisecarver, sister-in-law
Alex Beeman, friend
Julian Berger, friend
Eric Varnau, friend

2. Please review all of these materials. Then follow-up with family and friends of Eddie Bell to develop comparable testimony at the Sentencing Hearing to show how Eddie's friends, and family have been impacted by this process.

Enclosures (12)

cc: Mr. Edward Nathaniel Bell

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

[CLERK'S OFFICE U.S. DIST COURT]
[AT ABINGDON, VA]
[FILED]
[JUL 07 2006]
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[DEPUTY CLERK]

EDWARD N. BELL, **Petitioner**	)	Case No. 7:04CV00752
v.	)	**JUDGMENT**
LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON, **Respondent.**	)	By: James P. Jones Chief United States District Judge

For the reasons stated on the record on July 6, 2006, it is **ADJUDGED AND ORDERED** that the Amended Petition for a Writ of Habeas Corpus is DENIED and this action is DISMISSED.

ENTER: July 7, 2006

/s/ James P. Jones
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,

Petitioner,

v. Civil Action 7:04CV00752

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

WARDEN'S OPPOSITION TO
PETITIONER'S MOTION
TO AMEND JUDGMENT

The Warden of the Sussex I State Prison opposes Edward Bell's motion to amend judgment for the following reasons:

On December 23, 2004, this Court stayed the order of the Winchester, Virginia Circuit Court requiring the execution of Bell's death sentence for his capital murder of Police Officer Richard Timbrook. On February 7, 2006, the Court dismissed all but one of Bell's claims for relief under 28 U.S.C. § 2254. Bell v. Warden, 413 F. Supp. 2d 657 (W.D.Va. 2006). By order entered on July 7, 2006, the Court denied the remaining claim. On July 21, 2006, Bell filed a motion to amend judgment under Federal Rule of Civil Procedure 59(e).

Bell contends that new evidence allegedly was presented at the evidentiary hearing on July 6, 2006,

in the form of his trial counsel's testimony regarding the decisions counsel made with respect to his investigation and representation of Bell at the sentencing phase of trial. Bell argues that counsel's opinions about the Winchester community constitute "new evidence" supporting a claim that he was denied a fair trial and that trial counsel were ineffective for failing to convince the trial court to change venue. He says that the Warden's argument that trial counsel's actions regarding their pretrial mitigation investigation were reasonable also constitutes "new evidence" to support his venue claim.

A. Rule 59 Standard

Rule 59(e) requires that the motion be filed "no later than 10 days after entry of the judgment." It is undeniable that the judgment Bell seeks to amend is this Court's judgment of February 7, 2006, dismissing his claim of pretrial prejudice. Bell, 413 F. Supp. 2d at 718-721. Clearly, his motion was filed more than 10 days after that February 7 decision and it thus comes too late for consideration. See United States v. McMahan, 8 Fed. Appx. 272, 274, 2001 U.S. App. LEXIS 8698 at page *2 (4th Cir. 2001) (unpub.); Fenninger v. Harris Crab House, Inc., No. 98-2526, 2000 U.S. App. LEXIS 4285 at page *9 (4th Cir. 2000) (unpub.); Kontoulas v. A. H. Robins, Co., 745 F.2d 312, 314 (4th Cir. 1984).

In any event, the function of a Rule 59(e) motion is to consider an intervening change of controlling law, new evidence or a manifestly unjust application of law. Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). It is not available simply to consider arguments which could have been made before judgment was entered, Beyah v. Murphy, 825 F.

Supp. 213, 214 (D.C. Wis. 1993), new legal theories, FDIC v. World University, Inc., 978 F.2d 10, 16 (1st Cir. 1992), or new facts, see Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986) ("motion to amend should [not] be employed to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits."); see also McDaniel v. Mead Corp., 622 F. Supp. 351 (W.D. Va. 1986) ("the rule was not intended to give the disappointed party another bite at the apple"); Delong v. Thompson, 790 F. Stipp. 594 (ED. Va. 1991), aff'd, 1993 U.S. App. LEXIS 1941 (4th Cir. 1993); Durkin v. Taylor, 444 F.Supp. 879, 888 (E.D.Va. 1977).

B. Bell's Arguments

Bell asserts that his alleged "new evidence" goes to a reconsideration of two claims. He says it is relevant to his claim that pretrial publicity and police officers in the courtroom prejudiced his right to a fair trial. (Mot. at 2). This Court dismissed that claim on the grounds that the Supreme Court of Virginia expressly found it defaulted during state habeas review. Bell, 413 F. Supp. 2d at 718-721. Obviously, Bell's "new evidence" assertion cannot affect that ruling.

Bell also says that the "new evidence" goes to a claim that trial counsel were ineffective in relation to the pretrial publicity/officers claim and he cites to page 162 of his amended petition. No such claim of ineffective assistance appears on page 162 or on pages 173-176 (the defaulted claim) of his amended petition, or even in his original petition. On page 162, he claims trial counsel were ineffective for not objecting to two jurors who allegedly were biased,

alleged sleeping jurors, alleged pre-deliberation by the jury and to the alleged presence of 13 jurors deliberating. He does not allege ineffective assistance related to his pretrial publicity claim. This Court did not address such a claim in its February 7, 2006, opinion. As such, Bell's assertion now of "new evidence" related to a claim he never presented to this Court cannot form the basis for Rule 59(e) reconsideration or amendment.

In any event, Bell's assertion that trial counsel's opinion testimony about the community's knowledge of Jamaican drug dealers constitutes *new* evidence showing that he received an unfair trial, is insupportable. As Bell's own amended petition recounts, trial counsel's views on the alleged prejudice in the community were well known at the time of trial. (Amended Pet. at 173-76). Trial counsel's pretrial motion stated as much (JA 42-43) as did his motion regarding "victim tokens or insignia," motion to dismiss the indictment based on on-going publicity and his argument on those motions and affidavit filed before trial. (JA 113, 346, 355, 632-48, 936-37, 973). Trial counsel's renewal of his motion to change venue likewise signaled counsel's opinion about community prejudice. (JA 461, 473, 1610).

Moreover, Bell presented the state habeas court with hundreds of pages of news articles and radio transcripts in support of his claim of pretrial prejudice. (State Habeas Appendix, unnumbered). And trial counsel were Bell's witnesses throughout his state habeas case and up until the evidentiary hearing before this Court. Bell has no excuse for not disclosing before the hearing his trial counsel's views which he considers to be "new." Bell simply cannot

legitimately claim that any evidence from his trial attorneys was new.

However, even if counsel's *opinions* were new, they could not stand as substantive evidence of prejudicial pretrial publicity. Bell cites no authority for such a proposition. The only cases he does cite are inapposite. In Small v. Hunt, 98 F.3d 789 (4th Cir. 1996), the Court's discussion of a class action regarding prison conditions addresses the disclosure of substantive evidence about prison bunk bed configuration. It has nothing to do with an unsubstantiated belief held by a witness or a party. In Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), the Eleventh Circuit granted relief as a *de novo* matter on the Florida inmate's claim that he was denied a fair trial due to prejudice in the community. Woods was a pre-§ 2254 case in which no analysis – or even mention – was made of any state court determination of the issue. It is a case Bell certainly could have cited in his initial and amended petitions before this Court. It has nothing to do with the "new evidence" argument on which Bell hangs his Rule 59(e) motion.

Indeed, even if Bell's Rule 59(e) motion were cognizable *and* this Court could reach the ineffective assistance claim not presented to this Court *and* his counsel's opinions were new, Bell's trial counsel's opinions certainly could not be considered as evidence showing prejudice in the community such that the state habeas court's rejection of the ineffective assistance of counsel claim based on the venue issue was *unreasonable* under § 2254. Counsel's *opinion* that there was community knowledge about Jamaican drug dealers – and suspicion that jurors would bring that knowledge to

bear in deliberations – is a far cry from evidence showing that there was such pervasive prejudice in the community that Bell could not receive a fair trial, much less evidence from which this Court could conclude under § 2254(d) that the Virginia Supreme Court unreasonably applied Strickland v. Washington, 446 U.S. 668 (1984), to dismiss the ineffective assistance claim presented to it (but not to this Court). (See Va. Sup. Ct. dismissal order 4/29/04 at 25-26). Bell presents no authority for such a decision by this Court.

CONCLUSION

The Court should deny Bell's Rule 59(e) motion.

Respectfully submitted,

LORETTA K. KELLY, WARDEN,
SUSSEX I STATE PRISON,
Respondent herein.

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

EDWARD N. BELL,	)	
	)	Case No. 7:04CV00752
Petitioner	)	
	)	
v.	)	**OPINION AND ORDER**
	)	
LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,	)	By: James P. Jones Chief United States District Judge
	)	
Respondent.	)	

The petitioner has filed a Motion to Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e).

Contrary to the respondent's assertion, I find that the motion is timely because it was filed within ten days of the final judgment in the case, even though it seeks reconsideration of an earlier decision by the court. *See Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469-70 (4th Cir. 1991). Nevertheless, after careful consideration, and for the other reasons stated by the respondent in her opposition, I find that the motion should be denied.

Accordingly, it is **ORDERED** that the Motion to Amend Judgment is DENIED.

ENTER: August 2, 2006

/s/ James P. Jones
Chief United States District Judge

PETITIONER'S BRIEF

101

Supreme Court, U.S.
FILED
JUL 31 2008
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(4)

No. 07-1223

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,

PETITIONER,

v.

LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court habeas proceedings, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. The question presented is:

Did the Fourth Circuit err when it applied the restrictive standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reprinted at Pet. App. 1a.[1] Its order denying rehearing and rehearing *en banc* is reprinted at Pet. App. 178a. The decision of the United States District Court for the Western District of Virginia is reported at *Bell v. True*, 413 F. Supp. 2d 657 (W.D. Va. 2006), and reprinted at Pet. App. 18a. The district court's oral ruling is unreported and reprinted at Pet. App. 168a.

JURISDICTION

The Fourth Circuit denied rehearing and rehearing *en banc* on January 29, 2008. Pet. App. 178a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Sixth Amendment, U.S. Const. amend. VI, and the relevant provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2254, are reproduced at Pet. App. 179a-80a.

STATEMENT OF THE CASE

This case comes to the Court with an undisturbed finding that the petitioner, Edward Nathaniel Bell, "diligently developed the factual basis of" his ineffective-assistance-of-counsel claim "in state

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[1] The appendix filed with the Petition is cited as "Pet. App." The joint appendix filed concurrently herewith is cited as "JA," while the appendix filed with the Fourth Circuit is cited as "CAJA."

court," such that "an evidentiary hearing is not barred by [28 U.S.C.] § 2254(e)(2)." Pet. App. 84a. On the basis of that finding, the district court granted a hearing, at which Bell uncovered and presented a wealth of new mitigating evidence that the state court never considered in its post-conviction review. The Warden has never disputed the district court's (e)(2) finding. While she challenged the district court's discretionary decision to conduct a hearing, the Fourth Circuit did not rule on her objection, and she did not reassert that objection in her brief in opposition.

After the evidentiary hearing, the district court held that the performance of Bell's trial counsel in the sentencing phase of his trial was constitutionally deficient within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 171a, 175a. The court nonetheless denied relief, however, because it concluded that the state court's finding that Bell had not been prejudiced was reasonable within the meaning of 28 U.S.C. § 2254(d). Pet. App. 12a & n.2, 175a. The Fourth Circuit affirmed for the same reason. Pet. App. 12a-13a, 16a-17a.

The question before this Court is whether § 2254(d) limited the federal courts to considering the reasonability of the state court's judgment—or whether they were instead required to decide for themselves whether Bell was prejudiced by his counsel's deficient performance—where no state court had ever considered the totality of available mitigating evidence.

The Underlying Facts. Bell is a Jamaican national, born in Jamaica to Rosaline and Oswald Bell. Bell's mother had twelve other children by four

different men. JA-268, 306. He spent his early childhood in a two-room shack in a rural Jamaican town. JA-306. Starting from early childhood, Bell's family regularly gave him drugs and alcohol, JA-173-74, 275, 304, 312, and he exhibited cognitive limitations that were exacerbated by a later severe head injury, earning him the nickname "Slow." JA-309-16, 363, 428, 504-10. His relationship with his father was both distant and troubled. For six months out of the year, Oswald was absent, performing farm labor in the United States. JA-306, 321. When he was home, Oswald saw his son's slowness as laziness—and responded by beating Bell with electrical cords, belts, wood planks, brooms, or whatever weapon was handy. JA-269, 323-28, 504-07. While Bell volunteered with police youth groups, JA-589, he never graduated high school, Pet. App. 80a, and could only secure the most menial work. JA-309-10, 507-08, 587-88.

Bell's family long nurtured a goal of emigrating to the United States. Bell's mother found a job in America in 1986 and began the process of bringing her family to join her. JA-271. That year, Bell's roommate Carol Anderson introduced him to her sister, Barbara Williams, JA-586, whom Bell later married and who gave birth to his first child, Kamille. JA-591. Though she was pregnant and ill when Bell's opportunity to emigrate came, Barbara was "happy" that the family's plan came to fruition. JA-598-99. While their marriage eventually failed, Barbara still speaks warmly of Bell and Kamille visits him to this day. JA-589-95.

In America, Bell met Dawn Jones. They settled together in West Virginia, and had Bell's second

child, Kydesha. JA-542. Kydesha was premature, and Jones would later describe for the federal court the long nights Bell spent by her incubator, praying for her survival. JA-515, 542-43. Eventually, Bell and Jones also separated, but again, Bell maintained a close relationship with his daughter, JA-544-45, and Jones respected Bell's efforts to be a good father to Kydesha. JA-546.

In Winchester, Bell met Tracy Nicholson, the daughter of Joanne Nicholson. JA-515-17, 562. Tracy already had a child, Alyse, whom Bell raised as his own. JA-563. Over time, Tracy and Bell had three more children: Diontre, Eddie, Jr., and Xavian. JA-233-49, 561.

During those years, Bell had only minor, "essentially non-violent," brushes with the law, Pet. App. 80a, and was never convicted of a felony or sentenced to serve even a single day in jail. JA-175-81. In 1999, however, Bell was arrested and charged with the murder of Sergeant Richard Timbrook. The Supreme Court of Virginia summarized the evidence at guilt/innocence as follows:

> Sergeant Timbrook chased Bell along several streets and down an alley between two houses .... These houses were separated by a fence approximately two or three feet in height. As Sergeant Timbrook started to climb over the fence, a shot rang out.
>
> * * *
>
> Sergeant Timbrook's body was found lying on the ground with his feet close to the fence and his upper torso leaning against a wall. His gun was still in its holster. Sergeant

> Timbrook was transported to a local hospital where he was pronounced dead. The cause of death was a single gunshot wound above his right eye, caused by a bullet which was fired from a distance of between six and eighteen inches.
>
> * * *
>
> The evening Sergeant Timbrook was shot was not the first encounter between Timbrook and Bell. Sergeant Timbrook had arrested Bell for carrying a concealed weapon in May 1997. The following year, in September 1998, Sergeant Timbrook was present during the execution of an Immigration and Naturalization Service order to detain Bell. Eight months later, Sergeant Timbrook assisted in executing a search warrant at Bell's home. Bell was present during that search. In the summer of 1999, one of Bell's friends heard Bell state, as Sergeant Timbrook drove by in a vehicle, "Somebody needs to bust a cap in his ass." Another of Bell's acquaintances testified that she heard Bell say that he would like to see Sergeant Timbrook dead, and that if he ever came face to face with Sergeant Timbrook, he would shoot Sergeant Timbrook in the head because he knew that Sergeant Timbrook wore a bullet-proof vest.

Pet. App. 184a-85a, 187a-88a. In January of 2001, a Virginia jury convicted Bell and sentenced him to death.

Pretrial Preparation. Bell's early defense

team consisted of Jud Fischel and Lloyd Snook. JA-41; Pet. App. 78a-79a. Snook was responsible for preparing the mitigation case, and Fischel assumed that Snook was doing so. JA-46; Pet. App. 79a. But Snook completely abdicated that responsibility and ultimately withdrew from the case. JA-45-55; Pet. App. 78a-79a. At the hearing on Snook's withdrawal, Fischel advised the court that he was "witnessing ineffective assistance of counsel in the midst of the case," JA-46, 665, and considered the mitigation case at that point to be "nonexistent." JA-66[illegible].

Fischel then asked the court to appoint Mark Williams, his "close personal friend," to replace Snook. JA-634-35, 666. Williams had no capital experience and was not on the Commonwealth's list of qualified capital defense attorneys. JA-55, 666; Pet. App. 79a. Yet Fischel delegated the entire mitigation case to him. JA-199, 203; Pet. App. 173a.

Williams failed miserably in his task. After only cursory interviews with Bell, two of his sisters, and their mother, Williams leapt to the conclusion that "there [wa]s little evidence that would assist in mitigating the case against Mr. Bell." JA-667, 805. Fischel recognized that Williams' conclusion was "premature," JA-667-68, but he did not direct further investigation. Neither thought to seek mitigation evidence from a host of other obvious witnesses that—as post-conviction counsel would later prove—were readily available and would have provided powerful mitigating testimony, including

- *Barbara Bell Williams*: Bell's wife and the mother of his first child, Kamille. JA-186; Pet. App. 171a-72a.

- *Carol Anderson*: Barbara's sister, and Bell's platonic housemate for over a year in Jamaica. JA-605-06; Pet. App. 172a.
- *Dawn Jones*: the mother of Bell's second child, Kydesha, and a prosecution witness. JA-193; Pet. App. 171a.
- *Tracy Nicholson*: the mother of Bell's youngest children, Diontre, Eddie, Jr., and Xavian, with whom he lived for six years. JA-188, 570-71, 705-06.
- *Joanne Nicholson*: Tracy's mother and thus the grandmother of the couple's children. JA-190-91; Pet. App. 172a.
- *Precious Henderson*: a co-worker of Bell's. JA-580; Pet. App. 172a.

Bell's counsel also failed to use the full panoply of resources made available to them by the state trial court. The trial court granted Bell the means to hire a fact investigator and a mitigation specialist. JA-749-50; CAJA 986. Bell's counsel never thought to deploy the fact investigator. JA-199, 664, 755-56. Snook did retain one mitigation specialist, Marie Deans, but he prevented her from doing any significant investigation. JA-195-96, 199, 204, 476-80, 483-85; Pet. App. 79a-80a. Deans, a veteran of over two hundred capital investigations, would later describe this as "[t]he most disorganized case" she had ever worked on—"it reached a level of absurdity, really." JA-481. After Williams took over for Snook, the court authorized another mitigation specialist—but Williams declined to hire one. JA-204, 281-82, 657, 687-88.

Bell's counsel did obtain the services of Dr.

William Stejskal, a psychological expert appointed under Virginia Code § 19.2-264.3:1. JA-412. Stejskal explained to counsel that his statutory role was heavily circumscribed. He made clear that he could not be relied on as a "one-stop shop" for mitigation services, JA-452, but instead would *only* analyze Bell's psychological development. JA-412-15, 434-39, 459-63, 677-83. Bell's counsel nonetheless relied entirely on Stejskal, and as a result no competent mitigation investigation was ever done. Pet. App. 173a-74a. Having heard their live testimony and judged their credibility, the district court on habeas review later found counsel's reliance on Stejskal unreasonable and their overall investigation "constitutionally deficient." Pet. App. 173a-75a.

Sentencing. Under Virginia law and the jury instructions, Bell was eligible for the death penalty only if the prosecution proved a statutory aggravating circumstance "beyond a reasonable doubt." Va. Code Ann. § 19.2-264.2; JA-158-59. The sole death-eligibility factor in this case was future dangerousness. JA-158-59. The prosecution argued that Bell is a violent man who harbors specific animus towards law enforcement officers, and that he would therefore be a threat to prison guards if sentenced to life in prison. JA-142-43.

To support its argument that Bell is violent by nature, the prosecution called two of Bell's former girlfriends. One, Billy Jo Swartz, claimed that Bell assaulted her—violently groping her, slamming her head into his car, and holding a gun to her head—and when Bell's then-pregnant girlfriend, Tracy Nicholson, arrived at the scene, he "hit [Tracy] and

knocked her down." JA-109-11. According to Swartz, Tracy then jumped on the hood of Bell's car, and Bell "stomped on the brakes" to knock her off. JA-110. Another former girlfriend, Dawn Jones, along with her friend Patrick Morrison, described an occasion on which Bell came into Jones' trailer and exhibited a gun during an argument. JA-115-18.

To support its argument that Bell poses a specific and ongoing threat to law enforcement, the prosecution relied primarily on the facts of the crime itself but also called two employees at the jail where Bell was confined pre-trial. Michael Bridge, a janitor, testified that Bell threatened him and called him a liar. JA-95-96. Officer Craig Robinson testified that, while Bell was handcuffed behind bars, Bell said "if you take these off, then you will see what happens." JA-97.[2]

Members of Sergeant Timbrook's family gave victim impact testimony. His father, mother, and sister all testified about Sergeant Timbrook, personalizing him and the loss they experienced with his death. JA-121-29. Sergeant Timbrook's widow

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[2] The prosecution also called other police witnesses. Sergeant W.D. Walker, of West Virginia, testified that Bell once gave him a false name and ran from him. JA-83-89. Sergeant Joe Adams testified that he once searched Bell and found legal ammunition. JA-90-93. A third officer said he once found a gun in Bell's trunk. JA-119-20. Corporal David Sheriff, a Jamaican officer, testified that Bell was convicted of assault and "malicious destruction of property" for tearing another boy's shirt. JA 101-06. None of these witnesses were probative of future dangerousness—the prosecution conceded that they had not done "that much damage," CAJA 189, 191-92, and the district court characterized these events as "essentially non-violent." Pet. App. 80a.

testified about her loss, and the experience of giving birth and raising her child after her husband's death. JA-129-33.

In contrast, the defense put on "no mitigating evidence" at all. JA-793. Over the course of the later federal evidentiary hearing, the district court characterized Bell's trial counsel's utter failure as "zero mitigating evidence," JA-793, "literally no mitigating evidence," JA-647, and not "one iota of mitigation." JA-648. Bell's counsel did call two witnesses during the penalty phase of the trial, but as the district court noted, counsel did not ask either of them "a single question . . . about Mr. Bell, about his background, about anything about him." JA-647. Williams called Bell's sister, Marjorie, but she only described how her children were harassed because of their relationship to Bell. JA-134-36, 714. Despite having never met or interviewed him prior to trial, Williams called Bell's father, Oswald, to testify and asked him on the fly how he "fe[lt] about this whole tragedy"—to which Oswald replied that, if Bell was guilty, he should be punished. JA-137-38, 207, 756-57. Oswald then asked for an opportunity to plead for his son's life. JA-138-39. When the court ruled that Oswald could testify further only in response to a question, Williams could not think of one to ask. JA-138-39, 714-15. In his closing argument, Williams conceded that "testimony that was offered was very graphic about a violent man," and that defense counsel "didn't rebut" or "try to defend . . . [or] refute" the prosecution's evidence in aggravation. JA-145.

In the Commonwealth's closing, the prosecution seized on the complete absence of mitigation

evidence as an affirmative reason for the jury to return a death sentence. The prosecution invoked the utter lack of mitigation evidence six times, and suggested that a death sentence was warranted because Bell could not find a single person in the world willing to stand up for him. JA-141-43, 148-50, 786-87.

Despite the one-sided sentencing phase, Bell's jury nonetheless struggled with the sentencing decision, asking the court whether, if they imposed a life sentence, there would be "any other way to be released from prison." Pet. App. 222a. The trial court declined to answer the jury's question. *Id.* Ultimately, having been provided no reason to spare Bell's life, the jury sentenced him to death. Pet. App. 2a. The Supreme Court of Virginia affirmed the conviction and sentence on June 7, 2002, Pet. App. 181a-230a, and this Court denied certiorari, *Bell v. Virginia*, 537 U.S. 1123 (2003).

State Post-Conviction Review. On state habeas, Bell asserted that his trial counsel was ineffective for having failed to investigate, identify, or present mitigating evidence. Pet. App. 237a-40a. Bell sought expert and investigative assistance, discovery, and an evidentiary hearing to develop and present his case. Pet. App. 29a. The Supreme Court of Virginia denied those requests, Pet. App. 30a, 261a, and then dismissed Bell's petition for failure of proof. Pet. App. 30a, 231a.

The state court found that Bell's ineffective-assistance claim did not satisfy either the deficient performance or the prejudice prong of *Strickland*. Pet. App. 238a-40a. In the same order in which the court denied Bell's request for an investigator and an

evidentiary hearing, it faulted Bell for "fail[ing] to proffer additional information that counsel should have discovered or presented during the penalty phase." Pet. App. 239a. The court concluded that the evidence Bell claimed his trial counsel missed was "'cross-purpose evidence' capable of aggravation and mitigation," and that counsel is, as a matter of law, never ineffective for failing to present such evidence. *Id.* Ultimately, the court saw no "reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigating evidence, the result of the proceeding would have been different." *Id.*

Federal Post-Conviction Review. Bell timely filed a federal habeas corpus petition in the United States District Court for the Western District of Virginia. The district court denied the Warden's motion to dismiss Bell's ineffective-assistance-of-counsel claim, held that Bell's diligence satisfied § 2254(e)(2), and ruled that Bell's allegations warranted an evidentiary hearing. Pet. App. 84a.

Unlike the state court, the district court granted Bell funds for an investigator to develop the factual basis of his challenge. CAJA 979-80, 989. With that assistance and the help of a mitigation specialist, federal post-conviction counsel uncovered a wealth of readily available evidence that (a) undercut generally and specifically the prosecution's case in aggravation, (b) established that Bell had been abused as a child, and (c) demonstrated redeeming aspects of Bell's character and relations to others. The district court also received testimony directly addressing the effect the omitted evidence would have had on Bell's jury.

Rebuttal of Aggravating Evidence. Neither the jury nor the Supreme Court of Virginia had heard from multiple witnesses who would have contradicted the prosecution's narrative of Bell as an irredeemably violent criminal who particularly hated law enforcement officers. Only the federal court heard Barbara Bell Williams testify that Bell was an active participant in police youth clubs and worked closely with police officers in performing community service projects. JA-588-89. Barbara, and Carmeta Albarus, both testified that Bell "had a lot of police friends" and a strong bond with at least two particular Jamaican officers. JA-513-14, 588-89. Dawn Jones and Joanne Nicholson testified that in their many years with Bell they never heard him threaten police or any other authority figure. JA-558, 578. Barbara, Carol Anderson, and Precious Henderson all testified that killing a police officer was inconsistent with Bell's character. JA-584, 593, 603.

Evidence newly adduced on federal habeas—and unseen by either the jury or the state court—would also have contravened the prosecution's direct evidence of animus. For example, the jury heard Officer Robinson testify that Bell threatened him. But neither the jury nor the state habeas court learned that Enos Davenport, incarcerated with Bell at the jail, saw Robinson "scream[] and yell[] at the top of his lungs directly in Mr. Bell's face" and that Bell held his composure and did not "disrespect this officer in any way." JA-250-51.

Bell's jury also heard Billy Jo Swartz claim that Bell assaulted her. The Supreme Court of Virginia saw affidavits from Tracy and Joanne Nicholson

explaining that the incident actually involved a fight between Swartz and Tracy and that Bell only sought to break it up. JA-188, 191. But only the federal court heard Joanne's live testimony disputing Swartz's account. JA-564-65. Although the state court speculated that the Nicholsons could have been impeached, the federal court *actually saw* the Warden's counsel directly confront Joanne Nicholson, overtly challenge her honesty, and present the most potent impeachment evidence counsel could find. JA-575-76. Having seen (as opposed to merely imagining) all of that, the federal court found Joanne Nicholson credible. Pet. App. 169a-70a, 172a.

And Bell's jury heard Dawn Jones testify about the day Bell entered her trailer with a gun after she ended their relationship. JA-117-18, 194. Bell's "[c]ounsel [were] unable to effectively cross-examine [Jones] because they had not interviewed her prior to trial," Pet. App. 171a, and in fact did not attempt to cross-examine her *at all*. JA-118. Neither the jury nor the Supreme Court of Virginia learned, therefore, that Bell never threatened anyone with the gun or that Jones and Bell made up soon after. JA-545-46, 552.

Child Abuse. The Supreme Court of Virginia had no idea that Bell was physically abused as a child. Only the federal court learned that Oswald would severely beat Bell using "electrical cords, belts, wood planks, and brooms." JA-323, 326, 422, 505. Only the federal court learned that Bell would be awakened at night by blows to the head from his father, and that Bell's body still bears scars from the buckle of his father's belt. JA-323. And only the

federal court learned that Oswald forced Bell's sisters to deprive him of food, JA-307, 323, and that Bell often fled the home to escape treatment his family refused to admit was child abuse. JA-326, 505.

Redeeming Aspects of Bell's Character and Relations. The Supreme Court of Virginia received an affidavit from Barbara Bell Williams affirming that Bell was a "caring" and "loving" father to their daughter, Kamille. JA-186. But the state habeas court did not learn that, while they lived together, Bell worked to make a good home for Barbara, cleaning the house and even cleaning her shoes. JA-587. The state habeas court did not hear that Bell regularly sent (and, indeed, still sends) letters and cards to Kamille. JA-591-92, 594. The state habeas court also did not learn that Kamille travels to the United States every year to visit her father, JA-591, or how Bell's incarceration has already traumatized Kamille. JA-592. Given how close Kamille is to her father, and how his incarceration has already affected her, Barbara believes that if Bell were executed Kamille might well "end up in a psychiatric ward at the psychiatric hospital." *Id.* Only the federal court learned those facts.

The jury and state habeas court also did not hear from Carol Anderson. Anderson testified on federal habeas that, because she was wary of living alone, she had asked Bell to stay with her. JA-601. Bell's jury heard (and the state habeas court read) Swartz's allegations of Bell's sexual infidelity and violence against women. Only the federal court learned the other side of Bell, hearing that with Anderson he behaved as a "[p]erfect young man,"

living in a separate room and making no advances towards her, keeping the house clean, and cooking her meals when she worked late. JA-601-02. Bell would routinely walk three miles round trip at night to escort Anderson home from work, so that she would not have to walk alone in an unsafe neighborhood. JA-602.

The Supreme Court of Virginia received an affidavit from Dawn Jones stating that Bell was a "loving and affectionate" father to their daughter Kydesha, and relating an incident when she found Bell at the hospital caring for Kydesha. JA-193. On federal habeas, Jones explained that Kydesha was chronically ill, requiring Bell to "spen[d] a lot of time taking [her] to the doctor and the hospital," JA-543, and Albarus described Bell's prayers for Kydesha's survival. JA-515, 542-43. Bell also cared for Jones when she suffered from toxemia, JA-541-42, and would cook and clean the house, while working a job to care for Jones and Kydesha. JA-542-43. After Bell and Jones parted ways, he worked to maintain a nurturing relationship with Kydesha, and Kydesha cherished her time with her father. JA-544-45, 550-51. Jones testified that Kydesha "loves [Bell] very much" and would be "devastated" by his execution. JA-551. Only the federal court learned those facts.

The Supreme Court of Virginia received written affidavits from Tracy and Joanne Nicholson, in which they described Bell as a "protective," "involved and loving father." JA-188, 190. But only the federal court actually met the children of Bell and Tracy Nicholson. *See* JA-561 (Joanne introducing the children to the district court, testimony the court characterized as "very relevant"); JA-233-49

(pictures of the Bell children and cards they sent to their father). Neither the jury nor the state habeas court saw Joanne Nicholson break down imagining the loss of Bell, JA-568, or heard her describe Bell's tears when his first son was born. JA-562. Nicholson also testified on federal habeas that Bell raised Tracy's daughter, Alyse, as though she were his own. JA-563; *see also* JA-240, 249.

Probable Jury Reaction. The Supreme Court of Virginia also heard no testimony about the weight a jury would likely attach to the undiscovered mitigating evidence. The federal court, however, received the testimony of Craig Cooley, Dr. Cunningham, and Dr. Stejskal. Cooley and Cunningham explained that a jury asked to decide whether a defendant is so irredeemably evil as to require execution will give great weight to positive aspects of a defendant's character, but will draw an adverse inference if no witness is willing to speak up on the defendant's behalf. JA-403-04, 764. Stejskal explained that the mitigation evidence presented on federal habeas could have been "presented . . . very effectively and very persuasively by . . . lay witnesses." JA-422, 437. The state habeas court had the benefit of none of this testimony.

District Court Decision. After the evidentiary hearing, the district court held that counsel's performance in the sentencing phase of Bell's trial was constitutionally deficient under *Strickland*, and that the state court's contrary ruling was unreasonable within the meaning of § 2254(d)—a finding that remains undisturbed today. Pet. App. 171a. Yet the district court nonetheless denied Bell's petition for lack of prejudice. Pet. App. 175a. The

district court never decided for itself whether counsel's ineffective representation prejudiced Bell by depriving him of a fair sentencing proceeding. It determined only that the state court's finding that Bell suffered no such prejudice was reasonable. *See* Pet. App. 12a-14a.

Appellate Proceedings. On appeal, Bell argued that the district court erred in applying § 2254(d) instead of reviewing the prejudice issue *de novo*. Bell argued that the additional mitigating evidence that he uncovered on federal habeas gave rise to a new claim that had not been adjudicated on the merits by the Supreme Court of Virginia, and that § 2254(d) therefore did not apply. *See* Brief of Petitioner-Appellant at 37-38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007); Reply Brief of Petitioner-Appellant at 23 n.9, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007). The Fourth Circuit rejected that argument without explanation. Accordingly, instead of determining Bell's claim on the merits, the court of appeals also applied § 2254(d)'s reasonableness standard, which it characterized as "substantially higher" than mere error. Pet. App. 12a-13a. In its brief, unpublished opinion, the court of appeals upheld the district court's finding that the state court's no-prejudice finding was reasonable. Pet. App. 13a-14a.

The Fourth Circuit denied Bell's petition for rehearing and rehearing *en banc* on January 29, 2008. Pet. App. 178a. Bell timely petitioned for a writ of certiorari, which this Court granted on May 12, 2008. *Bell v. Kelly*, 128 S. Ct. 2108 (2008).

SUMMARY OF THE ARGUMENT

The overwhelming majority of petitions for federal habeas review are resolved on an evidentiary record identical to, or very nearly identical to, the record utilized by the state court during its own post-conviction proceedings. In those cases, the claims adjudicated by the state and federal courts are the same, and § 2254(d) therefore applies to limit the federal court's power to grant relief.

In a small minority of cases, however, the evidentiary record will expand or change to such an extent that the claim adjudicated by the federal court will differ significantly from the claim before the state court. Modern procedural restrictions on the availability of fact development opportunities in federal habeas—mainly, § 2254(e)(2)'s prohibition on evidentiary hearings for petitioners who "failed to develop" the facts in state court—make such cases rare. And the reality that what a litigant alleges cannot always be fully proven in court makes them rarer still. But where, as here, a petitioner establishes his entitlement to fact development and proves facts not before the state court that significantly affect the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts, then the claim adjudicated by the state court ceases to be susceptible to meaningful review under § 2254(d).

Section 2254(d) does not apply in these circumstances. By its plain language, it applies only to "claims" that were "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). A "claim" is the application of governing law to a particular set of

facts. The admission of significant new evidence on federal habeas, therefore, may give rise to a new "claim" that no state court has previously "adjudicated on the merits." In *Holland v. Jackson*, 542 U.S. 649, 653 (2004), this Court assumed that proposition to be true. And the idea that new facts can give rise to a new claim in a way that controls the application of § 2254(d) finds considerable support in this Court's jurisprudence. *See also Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Price v. Vincent*, 538 U.S. 634, 638 (2003); *Vasquez v. Hillery*, 474 U.S. 254, 258-60 (1986).

Moreover, no other interpretation can be reconciled with the overall structure of § 2254. Section 2254(e)(1) provides that, although "a determination of a factual issue made by a State court shall be presumed to be correct," that presumption may be rebutted "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). And § 2254(e)(2) authorizes evidentiary hearings where a petitioner diligently attempted to develop the factual basis of a claim in state court. *Michael Williams v. Taylor*, 529 U.S. 420, 431-33 (2000). As (e)(1) presumes the state court has made relevant "determination[s] of factual issue[s]," Congress clearly expected federal courts to hold (e)(2) hearings in cases where a state court previously addressed at least some of the facts upon which a federal petitioner relies. In *Holland* and related cases, however, this Court made clear that (d)(1) cannot be satisfied using new evidence not before the state court, 542 U.S. at 652, and (d)(2)'s plain text contains a similar limitation. If new evidence cannot give rise to a new "claim" not subject to the strictures of § 2254(d), then the evidence adduced at

an (e)(2) hearing will have no work to do, even where it clearly and convincingly disproves a state court factual finding pursuant to (e)(1). That cannot be the law.

Of course, not all new evidence will suffice to give rise to a new "claim" not subject to § 2254(d). Rather, new evidence on federal habeas must significantly alter the claim presented in state court, in order to give rise to a new "claim" upon which the state court did not rule. By any standard, however, the new evidence presented on federal habeas in this case was sufficient to render § 2254(d) inapplicable. The only death-eligibility factor argued in Bell's case was future dangerousness, and evidence the state habeas court never saw contradicted that factor—both generally, by depicting Bell as non-violent and specifically, by contravening individual items of testimony upon which the prosecution relied. Moreover, evidence the state habeas court never saw provided independent reasons a jury might have chosen to spare Bell's life, as their instructions permitted them to do, even if they found future dangerousness—evidence both that Bell was abused as a child and that there are positive aspects of his character and relationships with others that might have moved his jury to mercy. Finally, only the federal court received expert testimony directly relating this mitigating evidence to the probable deliberations of Bell's jury.

The record before the federal court thus presented a new "claim," the "merits" of which no state court had ever adjudicated. Section 2254(d) therefore did not apply, and this Court should reverse.

Independently, even if § 2254(d) did apply, it was satisfied because the Supreme Court of Virginia's decision rested on unreasonable application of clearly established federal law. The state habeas court resolved important factual disputes without affording Bell a full and fair hearing on them. Pet. App. 84a. In so doing, that court unreasonably applied *McNeal v. Culver*, 365 U.S. 109 (1961), and *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956), both of which require a hearing in such circumstances. The state court's judgment thus rested on "an antecedent unreasonable application of federal law," satisfying § 2254(d) and permitting this Court to "resolve [Bell's] claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007).

ARGUMENT

The proper introduction on federal habeas of new evidence that affects the court's application of the relevant constitutional rule or its impression of the relevant facts gives rise to a "claim" that has not been "adjudicated on the merits" within the meaning of § 2254(d)—such that § 2254(d) by its own terms does not apply. In those rare cases, the federal court must decide *de novo* whether the claim entitles the prisoner to relief. That conclusion is clear from the language of § 2254(d), this Court's prior precedents, and the structure and history of AEDPA. The statute does not require federal courts to defer to a state court's resolution of a claim it never considered.

Yet that is exactly what the courts below did in this case. The federal court received new evidence demonstrating that trial counsel's deficient

investigation led them to miss opportunities to rebut key prosecution themes and evidence in aggravation, left them (and the jury) unaware that Bell was abused as a child, and prevented them from showing the jury positive aspects of Bell's character through the testimony of innocent women and children who love Bell and would be devastated by his death. Also, only the federal court received expert testimony evaluating the effect such evidence would have on a jury. The evidence newly developed on federal habeas is clearly sufficient to relieve Bell's claim of the strictures of § 2254(d).

I. 28 U.S.C. § 2254(D) DOES NOT APPLY WHEN SIGNIFICANT NEW EVIDENCE PROPERLY IS INTRODUCED ON FEDERAL HABEAS

Before AEDPA, this Court debated the standard federal habeas courts should apply in § 2254 cases when evaluating state court judgments pursuant to which a prisoner is detained. In *Wright v. West*, 505 U.S. 277 (1992), for example, three Justices of this Court suggested that such judgments should be upheld unless they are unreasonable, *see id.* at 285-95 (Thomas, J.), while three more contended that federal review should be *de novo*, *see id.* at 297-308 (O'Connor, J. concurring). Congress stepped into that debate in 1996, and with the passage of AEDPA codified a reasonability standard, limited to a specific set of issues. The balance Congress struck is reflected in the current text of § 2254(d), which reads as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

> judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As its opening clause makes clear, § 2254(d) does not raise the bar for *all* habeas petitions brought on behalf of state prisoners. Rather, it limits a federal court's authority to grant the writ only with respect to "claim[s] that [were] adjudicated on the merits in State court proceedings." Any claim or component thereof that is properly before a federal court and was *not* adjudicated on the merits in state court falls outside of the constraints imposed by § 2254(d)—and is therefore reviewed *de novo* on its merits by the federal court.

For example, in *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), this Court examined "the issue of prejudice . . . *de novo*" because "the state courts found the representation adequate" and hence "never reached the issue of prejudice." *See also Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (similar). Similarly, where a state court avoids addressing the merits of a federal claim by means of a flawed procedural ruling, the courts of appeals unanimously

hold that § 2254(d) does not apply to a federal court's later review of the merits. *See, e.g.*, *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001) (holding that § 2254(d) does not apply where state court resolves a claim on procedural grounds); *Hudson v. Hunt*, 235 F.3d 892, 895 (4th Cir. 2000) (similar); *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000) (similar), *cert. denied*, 531 U.S. 1182 (2001); *Graves v. Dretke*, 442 F.3d 334, 339 (5th Cir.) (similar), *cert. denied*, 127 S. Ct. 374 (2006); *see generally* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 32.2 (5th ed. 2007).

That much is common ground. The question in this case is whether a federal court should similarly forego application of § 2254(d) and apply *de novo* review when it properly receives on habeas significant new evidence that the state court did not hear. As this Court assumed in *Holland*, and as several circuit courts of appeals have already recognized, this question must also be answered in the affirmative. A federal court that permissibly takes significant new evidence has before it a "claim" different from the one "adjudicated on the merits" by the state court. *See Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003) (admission of new *Brady* material on federal habeas takes claim out of § 2254(d) because "no state court considered" the totality of exculpatory evidence seen by federal court); *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006) (similar); *Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002) (similar); *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (where *Strickland* claim is based in part on evidence wrongly disregarded by the state court, "the

prejudice flowing from *all* of counsel's deficient performance . . . has never been made in the state courts, so we have no state decision to defer to under § 2254(d)"). The plain language of § 2254(d), this Court's prior precedents, and the structure and history of the statute all confirm that interpretation.

A. The Plain Language Of § 2254(d) Establishes That The Admission Of Sufficient New Evidence On Federal Habeas Will Transform A Claim Into One Not Previously Adjudicated On The Merits In State Court

The operative words of § 2254(d)'s opening clause are "claim . . . adjudicated on the merits." This Court has "ma[d]e clear that [the word] 'claim' as used in" similar provisions of AEDPA "is an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530 (defining "claim" as used in 28 U.S.C. § 2244). A federal basis for relief, in turn, consists of governing federal law applied to a particular set of facts. Indeed, *Black's Law Dictionary* 264 (8th ed. 2004) defines "claim" as "[t]he aggregate of operative facts giving rise to a right enforceable by a court."[3] The courts of appeals share that understanding. *See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414,

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[3] It is well-settled that where Congress uses a legal term, that term should be defined in its legal sense. *See, e.g., Bradley v. United States*, 410 U.S. 605, 609 (1973) ("Rather than using terms in their everyday sense, 'the law uses familiar legal expressions in their familiar legal sense.'") (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920)); *see also Boumediene v. Bush*, 128 S. Ct. 2229, 2242-43 (2008) (relying on *Black's Law Dictionary* to define "habeas corpus").

418 (2d Cir. 1989) (defining the word "claim" in the context of Rule 54(b) as "the aggregate of operative facts which give rise to a right enforceable in the courts'") (citation omitted). By its own terms, therefore, § 2254(d) applies only where the state courts previously applied the federal law at issue to the same basic set of operative facts.

Section 2254(d)'s reference to an adjudication "on the merits" reinforces the point, as a judgment is "on the merits" when it is "based on the evidence rather than on technical or procedural grounds." *Black's Law Dictionary* 860; *see also Gonzalez*, 545 U.S. at 532 n.4 ("The term 'on the merits' has multiple usages. . . . We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § 2254(a) and (d). When a movant asserts one of those grounds . . . he is making a habeas corpus claim."). At every turn, the opening clause of § 2254(d) ties its applicability to the state court's analysis of the law and facts that comprise a petitioner's claim.

Because the identity of a federal habeas "claim" is tied inexorably to the aggregate of operative facts to which governing federal law applies, it follows that any significant change in the aggregate facts will change the "claim" as well. *See, e.g., Joseph*, 469 F.3d at 469 (claim predicated in part on evidence "discovered only during federal habeas proceedings" "is *not the same* as the" claim brought in state court) (emphasis added).

B. This Court's Precedents Confirm That Sufficient New Evidence Will Create A New Claim

This Court has repeatedly recognized that the applicability of § 2254(d) is inextricably tied to the facts presented, respectively, to the state and federal courts. The Court first recognized that relationship in *Price*, where the respondent had raised a double jeopardy claim in both state and federal court. 538 U.S. at 638. The Court explained that the "double jeopardy claim . . . *arises out of the same set of facts* upon which [respondent] based his direct appeal, and the State Supreme Court's holding that no double jeopardy violation occurred *therefore* constituted an adjudication of this claim on the merits" triggering the application of § 2254(d). *Id.* (emphasis added). The *factual* identity between Vincent's double-jeopardy claim on state direct appeal and his double-jeopardy claim on federal habeas was essential to this Court's conclusion that § 2254(d) applied.

This Court confronted the issue more directly in *Holland*. There, the Sixth Circuit had found a state court's application of *Strickland* "unreasonable on the basis of evidence not properly before the state court"—namely, a proffer of witness testimony that was not submitted to the state court until after it had already denied relief. 542 U.S. at 652. This Court noted that, "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer." *Id.* at 653. Although this Court "assume[d], *arguendo*" that this approach was correct, the absence of a

lower court finding that § 2254(e)(2) permitted consideration of Jackson's new evidence made further consideration of § 2254(d)'s applicability unnecessary. *Id.* at 652-53.

This Court made the same assumption one year later in *Gonzalez*. In *Gonzalez*, this Court considered whether a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) should be analyzed as a successive habeas petition under 28 U.S.C. § 2244. 545 U.S. at 529-30. The Court noted that the text of "'§ 2244(b) applies only'" to "'a prisoner's "application" for a writ of habeas corpus.'" *Id.* at 530 (citations omitted). An "application," in turn, was "a filing that contains one or more 'claims.'" *Id.* This Court concluded that *some*, but not *all* Rule 60(b)(2) motions would raise "claims"—i.e., "asserted federal bas[es] for relief"—and thus constitute "application[s]" for a writ of habeas corpus. *Id.* The Court noted that a Rule 60(b)(2) "motion [that] seek[s] leave to present 'newly discovered evidence' . . . in support of a claim previously denied" would raise a "claim." *Id.* at 531. The Court "assume[ed]" without deciding "that reliance on a new factual predicate [would] cause[]" such a motion "to escape" the "prohibition of *claims*" previously presented. *Id.* at 530-31 (emphasis added). Just as a new factual predicate may create a new "claim" not barred by § 2244(b)(1)'s prohibition, so too may such evidence alter "the merits" of a "claim" previously "adjudicated" by a state court within the meaning of § 2254(d).

Indeed, that principle was embedded in this Court's jurisprudence long before AEDPA was enacted. In *Vasquez*, this Court considered an

assertion that blacks had been unlawfully excluded from the petitioner's grand jury. 474 U.S. at 256. On federal habeas, the district court supplemented the record by allowing the parties to "provide more figures" on the racial composition of the relevant community, as well as statistical analyses. *Id.* at 258. Respondent urged that such additional factual development on federal habeas constituted a circumvention of the exhaustion requirement. *Id.* at 257. This Court recognized that new facts presented on federal habeas could in appropriate circumstances "fundamentally alter the legal claim already considered by the state courts," but held that the supplemental evidence in the case before it did not rise to that level. *Id.* at 260.

In sum, this Court has repeatedly recognized that the identity of a habeas "claim" is inextricably intertwined with its factual predicate, and that significant new facts will change that identity, giving rise to a new claim that was not "adjudicated on the merits" in state court within the meaning of § 2254(d).

C. The Structure Of § 2254 Confirms That Sufficient New Evidence Will Transform A Post-Conviction Challenge Into A New Claim That Is Not Subject To § 2254(d)

If this Court were to hold that, despite the introduction of significant new evidence, a federal court must still assess the merits of the modified claim under § 2254(d), with reference to the prior state court decision rendered on an outdated evidentiary record, that holding would effectively nullify core aspects of § 2254(e). A statute should of course be interpreted, where possible, to give

meaning to all of its text. So too here. These AEDPA provisions can and should be reconciled by recognizing that the introduction of substantial new evidence will create a new claim, never before adjudicated on the merits, that is not subject to the strictures of § 2254(d).

Section 2254(e) reads, in relevant part, as follows:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

Although such hearings are meant to be relatively rare, subsection (e)(1) makes clear that Congress envisioned evidentiary hearings on federal habeas in cases in which state courts have previously ruled on some of the facts upon which a federal petitioner later relies. Among other circumstances, Congress authorized federal evidentiary hearings where a petitioner attempted diligently to develop his claim in state court. *Michael Williams*, 529 U.S. at 432-33. And Congress contemplated that the evidence adduced at such a hearing might clearly and convincingly rebut a state court's earlier factual findings.

If this Court were to reject petitioner's interpretation of § 2254(d), however, a factual rebuttal under § 2254(e) could not affect the *judgment* of a federal court entertaining a habeas petition because the petitioner could not, through use of the new evidence, satisfy the conditions of (d)(1) or (d)(2). *See* 28 U.S.C. § 2254(d) (absent satisfaction of (d)(1) or (d)(2), "a writ of habeas corpus . . . shall not be granted").

This Court's precedents with respect to (d)(1) are abundantly clear. In *Holland*, the Sixth Circuit had found a state court's application of *Strickland* "unreasonable on the basis of evidence not properly before the state court." 542 U.S. at 652. This Court reversed, holding that "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* And *Holland* broke no new ground in that respect. Rather, it cited *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (*per curiam*), as "denying relief where state

court's application of federal law was 'supported by the record,'" *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003), as requiring that the "reasonableness of [a] state court's factual finding [be] assessed 'in light of the record before the court,'" and *Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002), as "declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law." 542 U.S. at 652. Under *Holland* and the authorities it cites, a federal court is unequivocally foreclosed from considering evidence newly admitted on federal habeas in determining whether a petitioner has satisfied (d)(1).[4]

With respect to (d)(2), the text of the statute is itself dispositive. The plain language of (d)(2) requires federal courts to assess factual unreasonability "in light of the evidence presented in the State court proceeding," a formulation that leaves no room for the consideration of evidence newly received on federal habeas.

The provision in § 2254(e) for rebutting state court factual determinations with new evidence admitted in federal evidentiary hearings can retain vitality, therefore, only if the petitioners' claims in those circumstances are viewed as new claims, not subject to the requirements of § 2254(d), as

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[4] Just as the "unreasonable application" clause of (d)(1) is closed to new evidence, so too is the "contrary to" clause. *See Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000) (holding that the "contrary to" clause is tested against the "set of facts" that "the *state court confronts*," leaving no room for new evidence received on federal habeas) (emphasis added); *see also Holland*, 542 U.S. at 652 (construing *Bell v. Cone* to hold that new evidence cannot establish that a state court's "decision was contrary to federal law").

petitioner suggests. If, as the Fourth Circuit held, no amount of new evidence can result in a new "claim" for these purposes, then "a writ of habeas corpus . . . *shall not* [ever] be granted" based on § 2254(e)'s provision for rebuttal of state court factual determinations, rendering that provision a dead letter. That cannot be correct. Congress plainly intended the mechanism for rebutting a state court's factual determinations by clear and convincing evidence under (e)(1) in an evidentiary hearing conducted pursuant to (e)(2) to have some real-world impact. Congress cannot have intended the federal courts to hold purely advisory evidentiary hearings.

In *Michael Williams*, this Court interpreted § 2254(e) in a way that would "avoid[] putting it in needless tension with § 2254(d)." 529 U.S. at 434. The *Michael Williams* Court saw "no indication that Congress" intended a "harsh reading" of § 2254(e)'s "failed to develop" language that would bar a petitioner who had "pursued [a claim] with diligence" from receiving an evidentiary hearing "even if he could satisfy § 2254(d)." *Id.* at 434-35. It would be similarly implausible to believe that Congress intended through § 2254(d) categorically to bar relief for a petitioner who pursued his claim with diligence and thus qualified for a § 2244(e) evidentiary hearing at which he rebutted the state court's factual findings with clear and convincing evidence. *See also Castro v. United States*, 540 U.S. 375, 380 (2003) (rejecting construction of AEDPA that would "produce troublesome results" and "create procedural anomalies"). If a claim based on significant new evidence is excluded by the opening clause of § 2254(d) from the strictures of that

provision, subsections (d) and (e) work in harmony, with the former governing challenges based on the record before the state court, and the latter governing challenges based on new evidence. That is the only interpretation that reconciles and gives meaning to both subsections, and thus the only interpretation that makes sense in light of the structure of the statute.

D. Petitioner's Interpretation Better Balances The Relevant Policy Interests

It is undisputed that § 2254(d) was intended to increase respect for state court judgments on the merits of federal claims. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2855 (2007) (AEDPA intended "to 'further the principles of comity, finality, and federalism'"). Section 2254(d) accomplishes this objective by providing that, where a federal court finds constitutional error in a claim previously "adjudicated on the merits in State court proceedings," the federal court may remedy that error only if it is further convinced that the state court's adjudication was unreasonable or contrary to federal law within the meaning of § 2254(d)(1)-(2). Thus, where the federal court merely disagrees with the state court, the state court outcome stands; but where the state court's adjudication of the merits was demonstrably defective, § 2254(d) permits the federal court to give effect to its own judgment by issuing the writ. To function properly, this scheme requires that the merits of the claims passed upon by the state and federal courts be substantially the same. As a practical matter, a prior state court adjudication conducted on a materially incomplete record cannot be meaningfully evaluated under

§ 2254(d)(1) or (2) by a federal court applying the Constitution to a record completed after the state court proceedings concluded.

Indeed, this court has recognized that the principles of comity, finality, and federalism AEDPA promotes are implicated most strongly "where a federal court makes its determination based on the identical record that was considered by the state appellate court." *Sumner v. Mata*, 449 U.S. 539, 547 (1981). Where the records are identical, or nearly so, the potential affront to federalism and comity comes from permitting a federal court to second-guess the decision of a state court. Section 2254(d) speaks to that concern by forbidding federal habeas relief unless the state court's decision was not only incorrect, but unreasonably so.

On the other hand, where a federal habeas petitioner asserts that the state court did not permit him properly to develop the facts, and thus seeks to develop on federal habeas a record different from that reviewed by the state court, the potential affront to comity and federalism lies in the decision to permit the petitioner to re-open and expand upon the state court record. *That* concern is the domain of § 2254(e). *See Michael Williams*, 529 U.S. at 436 (finding § 2254(e) reflective of "Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus"). As *Michael Williams* teaches, § 2254(e) embodies "[p]rinciples of exhaustion" and "comity," which "dictate[] that . . . the state courts should have the first *opportunity* to review [a] claim and provide any necessary relief." *Id.* at 436-37 (citations omitted) (emphasis added). "For state courts to have their rightful *opportunity* to

adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error." *Id.* at 437 (emphasis added). Where a prisoner was diligent, however, and the state court simply did not avail itself of the opportunity to hear his claim, *Michael Williams* holds that "comity is not served by" forbidding an evidentiary hearing. *Id.*

If federalism and comity do not prevent a federal court from *receiving* new evidence, then those principles similarly should not prevent that court from *considering* the evidence it has received. *See id.* at 444 (holding that petitioner's diligence in state court "should suffice to establish cause for any procedural default" the prisoner "may have committed in not presenting [his] claims to the Virginia courts in the first instance"). Just as this Court in *Michael Williams* refused to "attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners," *id.* at 434, so too it should not attribute to Congress a purpose or design to withhold relief for claims that *no* court has ever considered on the merits. Yet the rule embraced by the Fourth Circuit would do exactly that. The Supreme Court of Virginia did not consider Bell's current claim on the merits because it elected not to permit development of the aggregate set of operative facts that defines the claim, and the federal courts took an unwarrantedly deferential view of Bell's claim because they erroneously believed they were constrained to do so by § 2254(d). Under a proper understanding of § 2254, the work of protecting federalism and comity in a case like this one is done by the diligence requirement of § 2254(e), not the heightened burden of (d). The powerful check of

§ 2254(e)'s diligence requirement, moreover, will guard against any urge by defense counsel to sandbag the state courts. *See Monroe*, 323 F.3d at 299 n.19 (section 2254(e)'s diligence requirement provides a sufficient check, such that declining to apply § 2254(d) to a new claim predicated on newly developed facts does not "encourage [petitioners] to be lax in their state court efforts").

At bottom, the federalism and comity concerns implicated by this case are addressed by § 2254(e), not § 2254(d). The rigorous diligence standard this Court set forth in *Michael Williams* amply protects state courts' right to have the first opportunity to adjudicate a federal constitutional claim raised by a prisoner in state custody. In order to be relieved from the strictures of § 2254(d), a habeas petitioner must

- Be found not to have "failed to develop" the factual basis of his claim, so that introduction of new evidence on federal habeas is permitted by § 2254(e)(2). *See Michael Williams*, 529 U.S. at 437; *Holland*, 542 U.S. at 653.
- Allege facts that, if proven, entitle him to relief and establish the propriety of a federal evidentiary hearing. *See Townsend v. Sain*, 372 U.S. 293, 313 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).
- Actually prove facts unseen by the state court that significantly affect the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts.

And even then, § 2254(d)'s strictures are lifted *only* with respect to the component of the petitioner's claim that is affected by the new evidence. *See, e.g.*, *Wiggins*, 539 U.S. at 534 (applying § 2254(d) to deficient performance, but not to prejudice, where state court never adjudicated prejudice); *Rompilla*, 545 U.S. at 390 (similar); *Monroe*, 323 F.3d 298-99 (only the materiality prong of petitioner's *Brady* claim excused from § 2254(d)'s strictures by virtue of new evidence); *Cargle*, 317 F.3d at 1212 (only the prejudice prong of petitioner's *Strickland* claim excused from § 2254(d)'s strictures by virtue of new evidence). Where these restrictive conditions are met, neither federalism nor comity require a federal court to pretend to defer to a state court's resolution of a question the state court was never asked.

II. THE NEW EVIDENCE THAT THE DISTRICT COURT PROPERLY RECEIVED ON FEDERAL HABEAS IN THIS CASE WAS SUFFICIENT TO REMOVE BELL'S CLAIM FROM THE STRICTURES OF § 2254(D)

Having denied Bell investigative resources and an evidentiary hearing, the Supreme Court of Virginia never saw or considered the significant new evidence that defined Bell's claim in federal court. Because the state court had never adjudicated that claim on the merits, the district court should have considered the claim *de novo*, and decided for itself whether Bell "is in custody in violation of the Constitution" under § 2254(a).

In saying this, petitioner does not suggest that all new evidence introduced on federal habeas will alter a claim sufficiently to render § 2254(d) inapplicable. But where, as here, new evidence significantly

affects the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts, then the claim adjudicated by the state court ceases to be susceptible to meaningful review under § 2254(d).

Whether in any particular case new evidence is significant enough to render § 2254(d) inapplicable will turn in part on the legal elements the petitioner is required to prove in order to secure relief, because the underlying legal doctrine will affect the relevance of the new facts. Where evidence is either missed by ineffective counsel or suppressed by a prosecutor, it is quite likely to be significant to a determination of *Strickland* prejudice or *Brady* materiality, because in making those determinations the "evidence [must be] considered collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995); *see also Wiggins*, 539 U.S. at 534 (*Strickland* prejudice analysis requires court to "reweigh the evidence [in support of the verdict] against the totality of available [contrary] evidence"). In these contexts, newly discovered evidence not presented to the state court will change the totality of evidence to be reweighed, often significantly enough to take a claim out of § 2254(d).

The Fourth Circuit recognized this in *Monroe*. Obliged to "assess the materiality of exculpatory evidence 'collectively, not item by item,'" the *Monroe* court reasoned that it was "unable to accord AEDPA deference on an item-by-item basis" to omitted evidence. 323 F.3d at 297-99. Accordingly, the Fourth Circuit found "no way of deferring to an earlier state court adjudication of materiality because no state court considered all of the *Brady*

material presented here." *Id.*

Of course, the fact that new evidence is more *likely* to be significant to a *Strickland* claim does not mean that it *always* will. Evidence that is technically new may often be trivial, such that its introduction will have no significant effect on the claim considered by the state court. *See id.* at 299 n.19. Conversely, though, the mere fact that some of the operative facts presented to the federal court were also developed before the state court will not always mean the claim remains the same. In *Cargle*, for example, the Tenth Circuit considered an ineffective-assistance-of-counsel claim predicated on a mix of evidence, some of which the state court considered and some of which it did not. 317 F.3d at 1212. Noting that no state court had assessed "the prejudice flowing from *all* of counsel's deficient performance," the Tenth Circuit found "no state decision to defer to under § 2254(d) on this issue." *Id.* Similarly, in *Monroe*, the Fourth Circuit faced a *Brady* claim predicated in part on "four items of exculpatory material considered in state court" and in part on "material that has surfaced for the first time during federal proceedings." 323 F.3d at 297-98. The Fourth Circuit found § 2254(d) inapplicable as "no state court considered *all* of the *Brady* material presented here." *Id.* at 299 (emphasis added).

In this case, the new evidence received on federal habeas fell into three broad categories. First, the federal court heard new evidence undermining the sole death-eligibility factor—evidence that might have left Bell's jury with a reasonable doubt about his future dangerousness if sentenced to life in

prison. Second, even assuming the jury would have found future dangerousness, the federal court heard new evidence that would have provided the jury independent reasons to spare Bell's life—evidence of abuse he suffered as a child, and evidence of redeeming aspects of his character and relationships. Finally, the federal court received expert testimony bearing directly on the jury's probable reaction to Bell's new mitigating evidence—a direct evaluation of prejudice that contextualized the other new evidence and was itself significant. Each of these categories of new evidence would alone be enough to significantly affect application of the *Strickland* prejudice standard and determination of the facts to which that standard must be applied. And considered in the aggregate, along with the evidence the state court *did* see, this new evidence unquestionably presented the district court with a claim different from that adjudicated by the Supreme Court of Virginia.

A. Evidence Rebutting The Sole Death-Eligibility Factor Argued By The Commonwealth

Before Bell's jury could decide whether the death penalty was the appropriate sentence, they first had to decide whether it was a permissible sentence. Under Virginia law and the jury instructions in this case, the jury could not impose a death sentence unless it found that the Commonwealth proved Bell's future dangerousness beyond a reasonable doubt. JA-158-59. New evidence undercutting that death-eligibility factor could therefore be highly significant in assessing whether Bell was prejudiced by his counsel's failings. *See, e.g.*, *Strickland*, 466 U.S. at

695 (where prosecution must prove a fact beyond a reasonable doubt, prejudice is shown if "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt").

In fact, new evidence that Bell presented on federal habeas had precisely that significance, as it contradicted the core theme of the prosecution's future-dangerousness case—that Bell is an irredeemably violent man who hates those involved in law enforcement. The state habeas court did not hear the witnesses who later testified in district court that Bell is not violent by nature, and that the crime of murder was completely out of character for him. JA-513, 584, 593, 603. Nor did the state court learn that Bell had been close friends with police officers and had actively participated in police youth clubs. JA-513-14, 578, 588-89, 603. The state court also did not learn of Enos Davenport, a witness who would contradict Robinson's testimony that Bell threatened him in jail. JA-250-51.

And while the state court did receive affidavits from Joanne and Tracy Nicholson, in which they contradicted Swartz's testimony of domestic violence, it did not hear Joanne's live testimony adamantly disputing Swartz's account, did not see Joanne's honesty challenged by the Warden, and did not observe her demeanor, which the district court found credible. JA-564-65, 575-76; Pet. App. 169a-70a, 172a. Nor did the state court hear Dawn Jones, the Commonwealth's own witness, provide context to her trial testimony that contradicted the prosecution's portrait of an irredeemably violent man. JA-540-51; Pet. App. 171a.

The difference between the Supreme Court of

Virginia's review of a cold record and the district court's live hearing of Bell's mitigation witnesses was itself significant, as this Court has previously recognized. In *Massaro v. United States*, 538 U.S. 500, 504 (2003), this Court held that petitioners in federal custody may raise ineffective-assistance-of-counsel claims for the first time on habeas. It adopted that rule in part because it appreciated that district courts are "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505. The Court explained that a district court enjoys a significant advantage over an appellate court because "'the district court hears spoken words we can see only in print and sees expressions we will never see.'" *Id.* at 506 (citations omitted). In addition to receiving evidence that was never introduced in state court in any form, the district court here had that same advantage over the state court, because unlike the state court the district court invited live testimony portraying vibrantly the mitigation case that competent counsel could and should have offered at trial. *See also Wainwright v. Witt*, 469 U.S. 412, 428 n.9 (1985) ("The manner of [a witness] while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen [on live testimony], but cannot always be spread upon the [written] record.") (citation omitted).

Petitioner does not suggest that the difference between reading a transcript and seeing live testimony will *always* be significant enough to render § 2254(d) inapplicable to a claim. In many cases, for example where expert testimony is involved, there may be little difference. In this case,

however, the demeanor of Bell's fact witnesses was clearly significant. The district court expressly relied on its "opportunity to observe the witnesses and make judgment[s] about their credibility," Pet. App. 169a-70a, characterized Barbara Williams as a "[v]ery nice person" who was "[v]ery respectful appearing," JA-694, characterized both Carol Anderson and Joanne Nicholson as "helpful" witnesses, Pet. App. 172a, and witnessed not just Joanne's testimony but also her emotional reaction to the prospect of Bell's execution. JA-568.

This Court need not decide whether, ultimately, the jury would have believed Bell's witnesses over the prosecution's with respect to his future dangerousness. Prejudice is established by a "reasonable probability" that the result would have been different. *Strickland*, 466 U.S. at 694-95; *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000). Had the jury heard the evidence that Bell's trial counsel failed to introduce, there is certainly a reasonable probability that they would come away with a different view of the likelihood that he would pose a danger if sentenced to life in prison. This Court has recognized that a jury will likely "give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization would suggest." *Rompilla*, 545 U.S. at 386 n.5. It is equally reasonable to assume that a jury will attach more weight to unadjudicated bad acts where, as here, trial counsel missed an opportunity to diminish their significance. Had counsel done their job, and introduced at trial the substantial rebuttal evidence later adduced on federal habeas, this Court cannot

be confident that the jury's decision would have been the same.

B. Affirmatively Mitigating Evidence, Heard For The First Time On Federal Habeas

Even if Bell's jury would have found future dangerousness beyond a reasonable doubt, had counsel performed competently that would only have made him *eligible* for a death sentence. To determine whether a death sentence was *appropriate*, Bell's jury was required next to consider "any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may" warrant a sentence less than death. JA-159. If the jury believed, based on all the evidence, "that the death penalty [wa]s not justified," it was required to impose a sentence of life imprisonment. JA-158.

Evidence omitted at trial due to trial counsel's inadequate performance provided two distinct sets of circumstances that a jury could easily have found "in fairness or mercy" warranted a sentence less than death: (1) evidence that Bell was abused as a child and (2) evidence that, despite the crime, Bell is a loving man who has formed deep and positive relationships with his partners, children, and step-daughter. Because most of this evidence was presented for the first time on federal habeas, the district court heard a case for prejudicial impact that was significantly different from and more powerful than the one adjudicated on the merits by the Supreme Court of Virginia.

1. Evidence of Child Abuse

The Supreme Court of Virginia never learned

that, when Bell's father was home, he frequently beat Bell with "electrical cords, belts, wood planks, and brooms," leaving scars Bell still bears today. JA-323; *see also* JA-326, 422, 505. Nor did that court learn that Bell was often awakened at night by blows to the head from his father, or that their father forced Bell's sisters to deprive him of food. JA-307, 323. That sort of evidence, of child abuse that may have caused or exacerbated a defendant's developmental and emotional difficulties, may carry tremendous weight with a jury considering whether justice and mercy argue for a sentence other than death. Indeed, this Court has thrice relied on evidence of child abuse unseen by a capital defendant's jury to find *Strickland* prejudice. *See Terry Williams*, 529 U.S. at 395, 398 (finding prejudice where counsel's errors kept the jury from learning "that Williams had been severely and repeatedly beaten by his father"); *Wiggins*, 539 U.S. at 535-37 (describing evidence of child abuse as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability," and finding prejudice from its omission); *Rompilla*, 545 U.S. at 392-93 (finding prejudice from failure to inform the jury that Rompilla "'was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks'") (citation omitted). Yet the state court, having denied Bell both investigative resources and a hearing, never considered whether the totality of the abuse Bell suffered would have reduced his culpability sufficiently, in the minds of his jury, to justify choosing life without parole instead of death. While the evidence of abuse suffered by Bell was less extreme than the abuse at issue in *Williams*,

Wiggins, and *Rompilla*, it may nonetheless have swayed a jury in these circumstances, and its introduction in the federal habeas proceedings gave rise to a claim not adjudicated on the merits by the state court, displacing the application of § 2254(d).

2. Evidence About Bell's Relationships And Redeeming Aspects of His Character

This Court has made abundantly clear that evidence of good character is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)). In *Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987), this Court recognized as mitigating the fact that "petitioner had been a fond and affectionate uncle to the children of one of his brothers." Bell adduced solely on federal habeas substantial similar evidence—the testimony of Barbara Bell Williams, Dawn Jones, and Joanne Nicholson regarding his strong and positive relationships with them and with his children, Kamille, Kydesha, Diontre, Eddie, Jr., and Xavian; the trauma these children will suffer if their father is executed; Barbara's description of Bell's community contributions, cleaning churches and ministering to the sick, the elderly, and other shut-ins; and Bell's efforts to support Barbara, Dawn, Tracy, and their children. JA-233-49, 541-42, 551, 561-63, 581-82, 589, 591-94.

That new evidence would certainly have been important to the jury's sentencing decision, and its introduction on federal habeas unquestionably changed the totality of mitigation evidence

significantly enough to transform the claim heard earlier by the Supreme Court of Virginia. Indeed, the courts of appeals have readily found similar positive character evidence sufficient alone to warrant habeas relief. In *Harris v. Dugger*, 874 F.2d 756, 761-64 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1989), for example, the court found prejudice from trial counsel's failure to present witnesses who "would have described Harris to the sentencing jury as a kind, decent man, a dependable employee, a family man, dedicated to his son, his niece and his ex-wife's other children. All of the witnesses found value in the appellant's life . . . ." In *Collier v. Turpin*, 177 F.3d 1184, 1201-04 (11th Cir. 1999), the court similarly found prejudice from trial counsel's failure to present witnesses who would have told the jury that the defendant, convicted of killing a police officer, was "generally a good family man and a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives." And in *Marshall v. Cathel*, 428 F.3d 452, 470-74 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006), the court found prejudice from trial counsel's failure to call the defendant's sons, who would have told the jury that their "'father was a loving father, and devoted to'" them and who would have asked the jury not to take their father away. Bell should not go to his death without any court having weighed for itself the impact that the totality of such mitigating evidence may have had on the jury had his trial counsel not failed him.

C. Evidence Regarding The Jury's Likely Reaction To The Mitigation Evidence, Heard For The First Time On Federal Habeas

At the federal evidentiary hearing, Bell offered direct, uncontradicted evidence of the prejudice he suffered from his attorneys' failure to offer the available mitigation evidence at the penalty phase of his trial. Craig Cooley is a veteran of over sixty capital cases. JA-373. Cooley is regularly approached to testify in ineffective-assistance cases, but declines "about 90 percent of the requests" because he is unwilling to second-guess trial counsel. JA-374. Cooley only serves when he perceives counsel's "omissions to be beyond the pale" such that his "ethical duty requires" him to testify. JA-608-09. From his extensive experience, Cooley testified in this case that evidence of "redeemable qualities, other things that either endeared [the defendant] to folks or were acts of kindness" is critical to give jurors "a justification . . . to select life without parole as opposed to a death penalty." JA-404. Cooley also testified that if, as here, counsel fails to give the jury "anything" that "they can hang their hat on" to "justif[y] them picking the lesser of these two very harsh penalties," then counsel not only "limit[s] their ability to go in that direction" but also invites jurors to infer that "there must not be anything at all out there" positive about the defendant—a devastating inference. JA-407-08. Dr. Cunningham agreed with Cooley's assessment. JA-763-64; *see also* JA-291-96, 759-60 (Cunningham's qualifications). And Dr. Stejskal testified that the lay witnesses trial counsel could have used would have been "potentially very

effective[] and very persuasive[]" to the jury. JA-422; *see also* JA-437. This testimony directly analyzing the likely effect on the jury's deliberations of the gap between what Bell's jury was presented and what they could have seen was sufficiently significant to Bell's *Strickland* claim as to render review of the state habeas decision under § 2254(d) inappropriate.

D. The Totality Of Available Mitigating Evidence Establishes Prejudice

As discussed, each of the categories of mitigating evidence newly developed on federal habeas was sufficiently significant, even when viewed in isolation, to give rise to a claim not previously adjudicated on the merits, and thereby to render § 2254(d) inapplicable. But it is unnecessary, and indeed would be incorrect, to view each of these categories of evidence in isolation. The *Strickland* prejudice inquiry requires courts to "reweigh the evidence [in support of the verdict] against the *totality* of available [contrary] evidence." *Wiggins*, 539 U.S. at 534 (emphasis added). When the totality of evidence—all of the evidence seen by the state habeas court and all of the evidence newly received on federal habeas—is assessed, it is abundantly clear that Bell was prejudiced by his trial counsel's failings.

The totality of mitigating evidence consists of all of the evidence received by the federal court—evidence rebutting the prosecution's themes and witnesses, evidence that Bell was abused as a child, evidence of positive aspects of Bell's character, and expert testimony regarding a jury's likely reaction to those facts, *plus* the evidence the Supreme Court of

Virginia received—for example, evidence establishing that, at the formative age of 3, Bell's older relatives routinely provided him rum drinks because they liked to watch him dance when he was under the influence. JA-173-74, 275, 304, 312. The state court also learned that, when Bell was 6, his family began supplying him with marijuana. JA-312. And the state court received evidence that dosing a toddler with drugs and alcohol causes lasting brain damage, because it "interfere[s] with . . . brain development." CAJA 310; *see also* JA-312-13 (childhood exposure to drugs and alcohol "blocks the developmental tasks including growth in maturity and coping capabilities, adaptive socialization, and responsible achievement"). The jury that sentenced Bell to death heard none of this evidence.

It is impossible to be confident that, had they seen the totality of available mitigating evidence, Bell's jury would nevertheless have sentenced him to death. The complete set of omitted evidence covers all aspects of a case in mitigation: witnesses would have undermined the sole death-eligibility factor, Bell's abuse as a child and mental limitations may have mitigated his culpability, and Bell's bond with his children provided an affirmative reason to spare his life. Had his counsel not failed, the jury might have entertained a reasonable doubt about whether Bell's hatred of law enforcement was so virulent that he could not safely be imprisoned for life without parole. *See* JA-158-59 (future dangerousness must be proven "beyond a reasonable doubt"). Had his counsel not failed, a reasonable juror might have found Bell's culpability mitigated by his abusive childhood and his cognitive impairments,

circumstances this Court has thrice found to establish prejudice. *See Terry Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 535-37; *Rompilla*, 545 U.S. at 392-93. And had his counsel not failed, a reasonable juror might have decided to spare Bell's life, because he is not irredeemably evil and out of consideration for the women and children who love him and would grieve his loss. *See Hitchcock*, 481 U.S. at 397-98 (relationship between defendant and nephew mitigating); *Marshall*, 428 F.3d at 470-72 (prejudice from failure to call sons who would implore jury not to take their father away); *Harris*, 874 F.2d at 761-64 (prejudice from failure to call witnesses who "found value in the appellant's life"); *Collier*, 177 F.3d at 1202 (same). Even seeing *no* evidence in mitigation, the jury struggled with its decision to sentence Bell to death. Pet. App. 222a. This Court cannot be confident that adding a fulsome mitigation case to the picture would have made no difference to the result.

Certainly the prosecutor's closing reveals that he found the absence of mitigation to be critical, so much so that it was worth repeating six times. JA-141-43, 148-50, 786-87. If the prosecutor—who watched the sentencing case closely, evaluated the credibility of his own witnesses, and observed the jury's reaction—found the absence of mitigation evidence that critical, this Court should find it important enough to demonstrate prejudice. *See Banks v. Dretke*, 540 U.S. 668, 700 (2004) (relying on prosecutor's penalty-phase summation in assessing materiality of excluded evidence under *Brady*).

The Supreme Court of Virginia and the Fourth Circuit both erred in relying on the ostensible "cross-

purpose" or "double-edged" aspect of Bell's mitigating evidence in reaching their contrary conclusions. The Warden has repeatedly insisted that the witnesses not called by trial counsel could have been forced, on cross-examination, to admit to additional incidents of domestic violence. That argument smacks of *post-hoc* rationalization. The prosecution had Dawn Jones on the stand and did not even attempt to elicit testimony regarding domestic violence. JA-116-18. Moreover, Bell's jury had already heard accusations of domestic violence against Bell. *See* JA-106-12 (Swartz); JA-70-71 (Officer Bowerman, who responded to a "domestic" at Bell's home). Although allegations of domestic violence are never to be taken lightly, the best testimony the Warden could elicit at the evidentiary hearing was quite modest. Jones testified that she and Bell had only three or four altercations over five years, and that she never needed medical attention or legal protection as a result. JA-552-53. The two remained friends after their relationship ended. JA-545-46. Joanne Nicholson testified that Bell was never violent with her daughter, JA-190, 563-64; Pet. App. 172a, and that he "worked hard at the[ir] relationship." JA-190. No one, not even the Warden, has ever suggested that Bell was ever violent towards Barbara Williams or Carol Anderson. And the larger picture, unseen by Bell's jury, is that each of these women still cared enough for Bell to be willing to testify on his behalf.

The Warden's insistence that a jury would react negatively to Bell's "abandonment" of Barbara Williams is also dubious. Barbara did not characterize Bell as having "abandoned" her—only the Warden has ever used that term. Quite to the

contrary, Barbara supported Bell's decision to emigrate, JA-598-99, and knew that the timing was outside of Bell's control. JA-590-91. Kamille's deep and ongoing relationship with Bell, and her relationship with her half-sister Kydesha, further undermines the Warden's suggestion. JA-559, 591-92.

The notion that Bell's mitigating evidence could have been undercut by the suggestion that he did not support his children, JA-648-49, is similarly belied by the facts. None of Bell's partners has ever sought a child support order, JA-577, 702, and each recognized Bell's good-faith efforts to provide money and gifts for the children whenever he could. JA-218, 543, 554-55, 559-60, 591-94. Indeed, even while imprisoned, Bell continues to send his children money from his commissary account. JA-594. Nor, finally, could Bell's mitigating evidence have been undercut by claims of his sexual promiscuity. The jury *already knew* that Bell had multiple partners, JA-407-09, 704-06, and Bell's relationships were not mere casual dalliances; each spanned years during which Bell supported his partner and their children. *See* JA-218, 554-55, 567-68, 587-90.

The Supreme Court of Virginia faithfully applies federal law just as this Court does. If the totality of available mitigating evidence undermines this Court's confidence in Bell's sentence, this Court should conclude that it would have undermined the state court's confidence as well—and thus that the new evidence not considered by the state court was significant. This Court should hold that the evidence Bell developed on federal habeas gave rise to an ineffective-assistance-of-counsel claim not

previously adjudicated on the merits by the Supreme Court of Virginia, rendering review under § 2254(d) inapplicable, find prejudice, and remand with instructions to grant habeas relief. *See, e.g.*, *Rompilla*, 545 U.S. at 393.

III. INDEPENDENTLY, THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT § 2254(D) WAS NOT SATISFIED, BECAUSE THE STATE COURT'S FAILURE TO CONDUCT A HEARING ITSELF CONSTITUTED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

As explained, this Court can and should resolve this case on the grounds that § 2254(d) simply does not apply to Bell's ineffective-assistance-of-counsel claim. If this Court concludes to the contrary, however, it should hold that § 2254(d)(1) is satisfied, because the state court's resolution of disputed factual claims without an evidentiary hearing constituted an unreasonable application of clearly established federal law.

In *Panetti*, 127 S. Ct. at 2855-59, this Court held that "clearly established Federal law" within the meaning of § 2254(d)(1) includes not merely the substantive rules announced by this Court—in *Panetti*, the prohibition on executing the incompetent announced in *Ford v. Wainwright*, 477 U.S. 399 (1986)—but also the *procedural* requirements this Court establishes for adjudicating such claims. The state court in *Panetti* unreasonably applied *Ford* by relying on "factfinding procedures" that, under clearly established federal law, were "'not adequate for reaching reasonably correct

results.'" 127 S. Ct. at 2859 (citation omitted). The procedures followed by the Supreme Court of Virginia in this case founder on the same ground.

Under clearly established federal law, state courts must hold an evidentiary hearing when, as here, a claimant presents a well-pleaded allegation of a constitutional violation, involving a factual dispute outside the record, on which the petitioner will be entitled to relief if he can prove his charge. In *McNeal*, a state prisoner sought habeas corpus from the Supreme Court of Florida, alleging that the State unlawfully failed to appoint counsel for him. 365 U.S. at 110. The state court rejected McNeal's claim on the papers, resting on the warden's return, and "without any hearing upon petitioner's allegations, discharged the writ." *Id.* at 111. This Court reversed, holding that petitioner's "allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are." *Id.* at 117; *see also Pennsylvania ex rel. Herman*, 350 U.S. at 120-21, 123 (where state habeas petitioner raises serious allegations in habeas petition, implicating "matters not shown by the record," and return does not establish that they are "frivolous or false," petitioner "cannot be denied a hearing"); *cf. Carter v. Texas*, 177 U.S. 442, 448 (1900) (state court may not "'refuse[] to hear any evidence'" and fail to "'investigat[e] into the truth or falsity of the allegations'") (citation omitted); *Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (error to resolve claim when "petitioner was not permitted to offer evidence to support his claim").

Just as in *McNeal*, the Supreme Court of Virginia resolved Bell's claim on a motion to dismiss, without

a hearing. Pet. App. 29a-30a. In the process, the state court resolved important factual disputes against him—concluding that Bell's proposed impeachment witnesses could have, themselves, been impeached by the Commonwealth, and that the ostensible "cross-purpose" aspect of mitigation evidence omitted by Bell's counsel justified omitting it. Pet. App. 239a-40a. The district court found that the Supreme Court of Virginia relied on a fact finding procedure that was "'not adequate to afford a full and fair hearing,'" Pet. App. 84a (citation omitted), and the Warden has never disputed that conclusion.

If the Court finds that the strictures of § 2254(d) apply at all to Bell's claim, therefore, it should hold that the Fourth Circuit erred in its application of § 2254(d) by not acknowledging that the state court unreasonably failed to apply clearly established federal law. To the extent that § 2254(d) applied to Bell's *Strickland* claim, because the "state court's adjudication of [his] claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied." *Panetti*, 127 S. Ct. at 2858. This Court should therefore "resolve [Bell's] claim without the deference AEDPA otherwise requires." *Id.*

CONCLUSION

The judgment of the Fourth Circuit should be reversed, and the case remanded with instructions to grant habeas relief.

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RESPONDENT'S BRIEF

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No. 07-1223

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In The
Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Bell claimed in state court that his trial counsel were constitutionally ineffective at sentencing for not investigating and presenting certain friends and family, and he presented affidavits of the witnesses supporting his claim. The state habeas court adjudicated Bell's claim on the merits: it assumed the truth of Bell's allegations, found that he failed to demonstrate either unreasonable performance or prejudice, and dismissed the claim on the pleadings. Bell presented the same claim to the district court along with some new allegations of facts about his own background that trial counsel allegedly failed to investigate. The district court announced that Bell had not failed to develop his claim in state court and held an evidentiary hearing at which Bell presented some of his witnesses. The district court then found that counsel's performance had been unreasonable, but denied relief on the strength of its independent finding that Bell failed to demonstrate prejudice. The Fourth Circuit expressly declined to address the performance issue and it too found that Bell failed to demonstrate prejudice. Given these circumstances:

> Did the Fourth Circuit err when it additionally applied the deferential standard of 28 U.S.C. § 2254(d) to Bell's claim that was (1) predicated on petitioner's factual allegations which the state court assumed were true and "adjudicated on the merits," and (2) supplemented by additional evidence permitted to be heard in an evidentiary hearing in the district court?

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STATEMENT OF THE CASE

This is not the case the petitioner makes it out to be. The petitioner overstates his claim and omits critical details. In some instances, he mischaracterizes the evidence, proceedings, and rulings below. Perhaps most critically, in his Question Presented, petitioner says that "the state court refused to consider" his evidence. Yet Edward Bell never has identified even one piece of evidence which the state court refused to consider.[1] The record demonstrates that the state court thoroughly considered every claim, allegation of fact, and evidentiary exhibit the petitioner chose to present. The dismissal on the pleadings *assumed all of Bell's factual allegations to be true.*

I. The Murder.

In 1999, Jamaican immigrants dominated the illegal drug-dealing scene in the small city of Winchester, Virginia. (JA 646).[2] Bell was a 35-year-old

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[1] Amicus Virginia Association of Criminal Defense Lawyers (VACDL) recognizes that the record does not support Bell's factual assertion in his Question Presented, as shown by its careful rewording of their own Question Presented to state that the case involves evidence "which the state court did not have before it and did not consider."

[2] References to the Joint Appendix filed in this Court are denoted "(JA ___)." References to Bell's Appendix filed with this certiorari petition are denoted "(CApp. ___)." References to the Joint Appendix filed in the Virginia Supreme Court on direct appeal are denoted "(VJA ___)." References to the Joint

(Continued on following page)

Jamaican national, living in Winchester. (JA 160). He was a sporadically-employed (JA 169-71), known drug dealer (VJA 1758) who had been convicted of carrying a concealed, semi-automatic weapon. (VJA 1703, 1724). Based on that conviction, the United States Immigration and Naturalization Services ("INS") had started deportation proceedings (VJA 1707), and also was considering the effect of the weapons conviction on Bell's application for United States citizenship. (VJA 1725).

Ricky Timbrook was a 32-year-old Winchester Police Sergeant. (VJA 3408). Officer Timbrook voluntarily joined the Special Enforcement Team ("SET") that worked in high-crime areas of the city (VJA 3033), taught in-service training for police, self-defense skills at the local women's shelter (VJA 3031), and spoke at local schools about the dangers of drugs. (VJA 1683). He worked in the Community Oriented Probation and Parole Services ("COPS") with parolees in high-crime areas. (VJA 1687). Officer Timbrook was a devoted family-man, and admired by his colleagues for his impeccable honesty and integrity. (VJA 3019). He was happily married and awaiting the birth of his first child. (JA 130-33).

Late on the night of October 29, 1999, Officer Timbrook and a parole officer were working together in the COPS program, driving a police vehicle

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Appendix filed in the Fourth Circuit are denoted "(4JA ___)." Other references to the record are self-explanatory.

and dressed in clothing identifying them as law-enforcement officers with SET. (VJA 1896). They saw two men standing in a dark alley in a high-crime area. One man started running as the officers parked their vehicle. Officer Timbrook immediately gave chase to the fleeing suspect, repeatedly yelling, "Stop! Police!" (CApp. 185a). Officer Timbrook, in excellent physical shape (VJA 1684), closely pursued the suspect. (VJA 1975).

The brief chase ended when the fleeing suspect stopped, turned and shot the officer at close range in his face. Officer Timbrook had not unholstered his service gun the entire time. (VJA 2093). The officers who found Timbrook moments later rushed him to the Emergency Room, but he was pronounced dead a short time later. (VJA 2394).

An extensive search of the area that night for the shooter was unsuccessful. (CApp. 185a). The next morning, officers found Bell hiding in a coal bin in the basement of a house he had broken into near the shooting. (CApp. 186a). He wore clothing seen on the fleeing suspect. (VJA 1824, 1873, 2062, 2257, 2283). He had gunshot residue on his hands (CApp. 186a), and $1800 worth of cocaine in his pocket (VJA 2513). The police found a .38-caliber revolver stashed outside the basement window. Forensic evidence established that the gun was the murder weapon (VJA 2313, 2418) and that it contained a DNA profile

which did not exclude Bell.[3] (VJA 2450-2451). Bell also had a key to a car (VJA 2506) in which police found bullets of the same type which killed Officer Timbrook. (VJA 2344). Police recovered an empty box of the same ammunition in Bell's home. (VJA 2350-2365).

While in jail, Bell confessed to another inmate that he had killed Timbrook because the officer was "out to get him." (VJA 2533).

During the subsequent capital murder trial, *see* Virginia Code § 18.2-31(6) (the premeditated killing of a police officer is capital murder), the jury learned that Bell was an armed drug-dealer (VJA 1758, 1821, 1823, 1836, 1839) who harbored personal animosity against Officer Timbrook. Officer Timbrook arrested Bell, both for the concealed weapons offense (VJA 1695-1696, 3288), and on the INS deportation warrant. (VJA 1696-1697). Officer Timbrook responded to at least one report of domestic violence against Bell. (VJA 1749). Bell repeatedly preached that someone should kill Officer Timbrook by shooting him in his head because Bell believed the

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[3] The Commonwealth's DNA expert extracted DNA from perspiration on the handle and trigger of the gun. PCR testing showed a mixture of three or more contributors that included the DNA profiles of Bell and the firearms examiner who had handled the gun after arrest. Officer Timbrook was not a contributor. Due to the complexity of the mixture, the expert could not calculate statistical probabilities relating to the observed profiles. (VJA 2449-53).

officer wore a bullet-proof vest. (VJA 1768). Billie Swartz testified that Bell practiced target shooting with her, was a good shot, and that he threatened to kill Billie if she testified against him. (JA 73-76).

INS scheduled a hearing for November 5, 1999, to decide whether Bell's naturalization application should be denied, and Bell had personal notice of that upcoming event. (VJA 1726, 3322). On October 29, 1999, when Bell ran from Officer Timbrook with a gun and cocaine on his person, he knew that proceedings likely to result in his deportation were imminent.

II. The Trial and Appeal.

The trial judge appointed two attorneys to represent Bell: Lloyd Snook, an experienced capital case defense attorney (VJA 801), and another attorney who had to withdraw due to a conflict of interest. (JA 629). The judge appointed Jud Fischel, another experienced capital case defense attorney (JA 626-29) to join Snook. Snook subsequently asked to withdraw after discovering that the "mitigation specialist" he had hired had done no work on the case. (4JA 2042-46; VJA 801-02). The trial judge granted a lengthy continuance (VJA 798-99) and appointed Mark Williams, another experienced defense attorney. Fischel specifically asked for Williams to be appointed even though this was Williams' first capital trial because Fischel knew him to be a good defense attorney in serious felony cases,

and also knew that Williams worked as a social worker for several years prior to becoming a lawyer. (JA 634-35). Fischel knew that Williams' experience would be beneficial in finding and assessing mitigating evidence. (VJA 802-03). Neither Fischel nor Williams wanted a "mitigation specialist" – an investigator without professional credentials – because they were not impressed by the ones they had seen, and believed Williams' background, along with their court-appointed expert, Dr. Stejskal, better satisfied the need for such assistance. (JA 656-57, 677, 732).

Dr. Stejskal is a well-known forensic psychologist with the University of Virginia's Institute of Law, Psychiatry and Public Policy (ILPP). (JA 639-40). Stejskal held himself out as a mitigation expert who would perform a "comprehensive" evaluation of Bell's "personal history and character, as well as his mental condition." (JA 257-58). ILPP advertised that its clinical faculty assists attorneys "in the development of mitigation," including the "development of comprehensive psycho-social summary/narrative based upon extensive and multi-source research and interviews encompassing the life history of a defendant." (4JA 1743). Stejskal prepared an exhaustive report of his "comprehensive understanding" of Bell, "based in a broad range of information and evaluation procedures." (JA 258). He detailed numerous family interviews, including Bell's

sister Nellie who lived in Jamaica, and extensive testing. (JA 257-79).[4]

Stejskal found that no neuropsychological or intellectual testing could be relied upon because Bell lied extensively to "fake bad" on test instruments. (JA 263-66, 277). He ruled out mental illness. (JA 262). Stejskal told counsel that Bell was of "average criminal intelligence," with an IQ in the upper 70's to mid 80's. (JA 139, 428). He advised trial counsel that Virginia's statutory mitigating factors relating to mental condition, *see* Virginia Code § 19.2-264.4, were not present in Bell's case. (JA 267).

Bell's counsel decided against using Stejskal as a sentencing witness based on Stejskal's explicit recommendation. Stejskal said the evidence he would be required to testify about was "double-edged." (JA 277-78). Among other things, Bell's family told Stejskal that Bell was a spoiled "mama's boy" who always got his way and that he fell in with the wrong crowd when he emigrated to the United States. (JA 269-70, 273). Bell told Stejskal a version of the shooting circumstances that did not conform to the evidence. (JA 266, 277-78).

In addition to Dr. Stejskal, trial counsel talked to their client, his sisters in Winchester, at least one of Bell's ex-girlfriends, the grandmother of three of

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[4] Neither Dr. Stejskal, trial counsel, nor Bell's habeas legal team ever has located school, medical, or other background records. (JA 260, 642-43).

Bell's five children, and Bell's mother and father. (JA 725, 727-29). Bell and his family reported that there was no abuse, mental illness or neglect in Bell's background. (JA 728).

Counsel knew Bell's criminal history and the fact that he had abandoned his pregnant wife in Jamaica, moved here and fathered four more children by two other women out of wedlock, and had assaulted his girlfriends. (JA 167, 729-31). They knew he did not provide child support for these children. (JA 737). They consulted with Professor Roger Groot at the Washington & Lee Capital Case Clearinghouse, and discussed with him possible strategies for the guilt and penalty phases. (JA 651-52).

Bell denied guilt and trial counsel mounted a vigorous defense. Counsel believed that, if the Winchester jury found him guilty, it would show no mercy in sentencing. (JA 695). Counsel believed that weak evidence about, and from, Bell's various ex-girlfriends, ex-wife, and children was potentially harmful. The prosecutor would argue, for example, that Ricky Timbrook never had the chance to see his only child. (JA 736-38). They strongly believed that they risked insulting the jury to present a "show him mercy due to his background" defense at sentencing after fighting the guilt phase "to the hilt." (JA 644).

On January 25, 2001, the jury found Bell guilty of the capital murder. It also found him guilty of the use of a firearm in the commission of murder, possession of a firearm while in possession of cocaine

and possession of cocaine with the intent to distribute. (VJA 2769).

In addition to the aggravating evidence of the circumstances of the crime itself which had been presented in the guilt phase, at sentencing the Commonwealth presented Bell's criminal history, including convictions for carrying a concealed weapon, fleeing an officer, reckless driving, driving on a suspended license, and giving false information. (JA 157; VJA 3451-78). Two West Virginia State Troopers testified about incidents involving Bell: on one occasion, Bell ran from the officer and was found hiding in a field after a massive search; in another, Bell possessed .38-caliber ammunition. Two jailors testified that Bell had threatened them. A Jamaican police officer testified that Bell had been convicted in Jamaica for assault and destruction of property at the age of 21.[5] (JA 81-106).

Billie Swartz detailed a horrifying sexual and physical assault on her by Bell. (JA 106-12). Dawn

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[5] Bell faulted trial counsel for not finding and presenting to the jury evidence that the Jamaican conviction for assault involved "merely" a fight in which Bell tore the victim's shirt. However, trial counsel's cross-examination *at trial* of the Jamaican officer revealed exactly that. (JA 105-06). Bell faulted trial counsel for not finding and presenting to the jury evidence that Bell's nickname in Jamaica was "Slow" or "Nattyslow." However, that same Jamaican officer testified that Bell's nickname in Jamaica was "Slow." (JA 102). Moreover, trial counsel knew that Bell's nickname in Winchester was "Fast Eddie," a fact they kept from the jury. (JA 660).

Jones and Patrick Morrison described an argument in which Bell brandished a gun. (JA 115-18). Witnesses testified that they bought their illegal drugs from Bell. (JA 113-14). Another officer described stopping Bell and finding an illegal, concealed .38-caliber handgun. (JA 119).

Officer Timbrook's father, mother, and sister testified. (JA 120-29). His young widow, pregnant with the couple's first child at the time of the murder, read a lengthy victim-impact statement describing the devastating effect that her husband's murder had had on her, and would have on her young son. (JA 129-33).

Counsel's planned strategy for the penalty phase was to (1) present evidence of secure prison conditions Bell would encounter serving a life sentence (JA 655), (2) befriend the Timbrook family in hopes of persuading them against wanting a death sentence (JA 653), (3) obtain mitigating evidence from Dr. Stejskal (JA 653), and (4) present the testimony of Nellie Hutchinson, petitioner's sister in Jamaica who was the only sibling then sympathetic to Bell's situation. (JA 649-50). The strategy did not succeed: the trial court held prison-condition evidence inadmissible under Virginia law (JA 655); the Timbrook family favored a death sentence for Bell (JA 653); Dr. Stejskal found nothing helpful and what evidence he did find was potentially harmful (JA 653); and Nellie died shortly before trial. (JA 649-50).

Bell's counsel knew the Commonwealth's evidence and appropriately cross-examined the Commonwealth's witnesses. (JA 718). They presented Bell's father and sister briefly to show the jury that Bell had a family who would be affected by the jury's sentence. (JA 134-39). Counsel argued to the jury that Bell would not be a danger to anyone in a maximum security prison, imprisonment for life would be harsh, any doubt about guilt should resolve in a life sentence, and Bell's execution would not bring back Officer Timbrook, but only would cause more pain by affecting Bell's innocent family. (JA 143-48).

The jury sentenced Bell to death, finding that he would continue to be a serious danger, *see* Virginia Code § 19.2-264.4, and to prison terms for the other crimes. On June 7, 2002, the Virginia Supreme Court unanimously affirmed, *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002) (CApp. 181a), and on January 13, 2003, this Court denied certiorari. *Bell v. Virginia*, 537 U.S. 1123 (2003).

III. State Habeas Corpus Review.

On November 13, 2002, pursuant to Virginia Code § 19.2-163.7, the state court appointed two capital-qualified lawyers to represent Bell in state habeas corpus proceedings.[6] Bell also had his own

[6] Virginia appoints habeas counsel as soon as the direct appeal is concluded in order to give them at least 120 days of

(Continued on following page)

investigator who was a lawyer. Habeas counsel filed a petition for a writ of habeas corpus in the Virginia Supreme Court on April 21, 2003, primarily making *Brady*[7] claims and alleging that Bell was mentally retarded.

Bell's third claim was an ineffective assistance of counsel claim alleging that trial counsel failed to investigate mitigating evidence. (JA 211). Bell argued that his sister and father had not turned out to be good witnesses, and counsel's closing argument did not discuss Bell's life or good qualities, ask for a life sentence, or discuss the fact that Bell would be ineligible for parole.[8] He alleged that counsel did not find and present the following evidence:

- Bell was the tenth of twelve children[9] and his father and mother had children by various other men and women;
- his father and mother were absent much of the time due to work and his sister Nellie raised him;
- he grew up in a small town in Jamaica on family land surrounded by family;

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preparation time before the state habeas petition must be filed. *See* Va. Code § 8.01-654.1.

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

[8] The trial court instructed the jury that Bell would be ineligible for parole on a life sentence. (4JA 67).

[9] This was in fact presented to the jury through Bell's sister, Marjorie. (JA 134).

- his family attended church seven days a week and sang in the church choir;
- relatives gave him alcohol and marijuana from an early age;
- he married Barbara in Jamaica;
- his mother came to the United States first and Bell came in 1992;
- Barbara gave birth to a daughter after Bell left;
- he was kind to Barbara and to his daughter and sent her gifts;
- he worked in the United States for his father and for various employers;
- he had four other children here by two women (which he alleged was normal behavior for a Jamaican);
- Dawn Jones gave birth to a child and Bell stayed by her side when she was ill;
- Tracey Nicholson gave birth to three children and she thought Bell was a good father;
- Joanne Nicholson (Tracey's mother) thought Bell was a good father; and
- Tracey and Joanne did not see Bell assault Billie Swartz and believed Bell never had been violent.

(JA 215-21). Bell presented the state court with a number of exhibits:

- 3/10/03 affidavit from his ex-wife, Barbara (JA 186);
- 3/6/03 affidavit from his ex-girlfriend, Tracey Nicholson (JA 188);
- 3/13/03 affidavit from his father (JA 207);
- 3/6/03 affidavit from Joanne Nicholson (JA 190)[10];
- undated affidavit from his ex-girlfriend, Dawn Jones (JA 193);
- 3/5/03 affidavit from juror Greer, who said she would have liked to have had more information about Bell (4JA 1246);
- 4/19/03 affidavit from Dr. Stejskal, who said his testing yielded "mixed results" and he did not know Bell did not graduate from school, was nicknamed "Nattyslow," or had trouble keeping a job (4JA 1744);
- 3/11/03 affidavit from Dorothy Downer, taken in Jamaica, who said Bell was friendly but slow (JA 209);
- 3/12/03 affidavits from trial counsel Fischel and Williams, who provided little

[10] The affidavits of Tracey and Joanne Nicholson and Bell's father stated that trial counsel had, in fact, interviewed them.

to no information regarding their mitigation investigation and strategy (JA 198, 203); and

- 3/12/03 affidavit from Marie Deans, the "mitigation specialist" who was hired by Snook but who did no work on the case (JA 195).

Bell moved the state habeas court to provide him discovery, but his requests related solely to his *Brady* claims. (Motions dated 5/8/03 and 1/15/04 filed in the Virginia Supreme Court, Rec. No. 030539).[11] In a conclusory motion, Bell asked for $ 15,000 to pay an unidentified "mitigation specialist." (Motion dated 6/24/03, Rec. No. 030539). As the Warden pointed out in opposition, Bell already had the services of two court-appointed habeas lawyers *and* his own investigator/attorney. (Opposition dated 6/30/03, Rec. No. 030539). The Virginia Supreme Court denied these motions. (Orders dated 6/23/03 and 4/29/04).

Except for the routine prayer at the end of his petition asking for an evidentiary hearing on all claims (See Bell's "Corrected Petition" dated 4/21/03, Rec. No. 030539, at page 47), Bell made no specific request for an evidentiary hearing on his inadequate

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[11] The first discovery motion also contained one brief paragraph asking for money to send his investigator to Jamaica to interview witnesses for his retardation and inadequate mitigation investigation claims, without justification or argument.

mitigation claim, and certainly no argument as to why a hearing was necessary on that claim.

On April 29, 2004, the Virginia Supreme Court granted the Warden's motion to dismiss Bell's petition. The court's decision *assumed the truth* of all of Bell's factual allegations of ineffective mitigation investigation and dismissed the claim, applying *Strickland v. Washington*, 466 U.S. 558 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003), to the facts Bell alleged. (JA 228-31). It found that Bell demonstrated neither deficient performance of counsel nor *Strickland* prejudice. (JA 231). It found that the allegations in the Nicholsons' affidavits regarding Swartz's trial testimony, and the Nicholsons' assertion that Bell never was violent, presented cross-purpose evidence which, if presented at trial, would have opened the door to damaging rebuttal evidence of police reports which showed that Tracey Nicholson made domestic violence charges against Bell. (JA 167, 231).[12]

Bell filed a petition for rehearing dated May 28, 2004, a motion to supplement his petition for rehearing dated June 17, 2004, and also something he called an "Amendment to Habeas Corpus Petition" dated August 18, 2004, but none of those filings

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[12] The Virginia Supreme Court found Bell's claim of retardation "frivolous" and that he, in fact, is not mentally retarded. (4JA 314-15). It further found that the allegations regarding trial counsel's closing argument were refuted by the record. (4JA 316).

related to his claim of inadequate mitigation investigation. The court denied those motions in orders dated September 2 and November 17, 2004. On December 2, 2004, the trial court set Bell's execution date for January 7, 2005.

On February 15, 2005, Bell filed a certiorari petition in this Court in which he argued that the Virginia Supreme Court's collateral review unconstitutionally denied him an evidentiary hearing, discovery, and experts on his *Brady* and retardation habeas claims. He asserted no right to a hearing, discovery or experts on his inadequate mitigation investigation claim. On April 18, 2005, this Court denied certiorari review. *Bell v. True*, 544 U.S. 985 (2005).

IV. Federal Habeas Corpus Review

On December 23, 2004, the United States District Court for the Western District of Virginia stayed Bell's execution and appointed federal habeas counsel. Without the assistance of any court-appointed investigators or experts, Bell filed a habeas corpus petition alleging that trial counsel were ineffective in their investigation of mitigating evidence:

- trial counsel had no option under the Constitution *not* to present mitigating evidence;
- the prosecutor argued at sentencing that there was no mitigation presented;

- counsel failed to obtain background records on Bell, to investigate abuse, learning disabilities, substance abuse, and retardation;
- counsel did not interview Bell's ex-wife, in-laws and an ex-girlfriend;
- counsel did not hire a "mitigation specialist;"
- evidence was available showing mental retardation and maybe "organic brain damage;"
- counsel did not give Dr. Stejskal unidentified records and information;
- an aunt would have testified that Bell was slow;
- an expert on post-traumatic stress disorder could have explained that Bell learned to run from the police by his experiences witnessing crimes in Jamaica;
- Bell's ex-wife could have testified that Bell was a loving father, had mental limitations and was nicknamed "Nattyslow;"
- Tracey Nicholson could have testified about Bell's non-violence and disputed Swartz's testimony;
- Joanne Nicholson could have testified that Bell was non-violent, was a good father and disputed Swartz's testimony;

- Dawn Jones could have testified that Bell was a good father and Bell stayed by her side during illness;
- Bell's infant children could have testified that they loved him;
- Rosa Starks-Cadet could have testified that she knew Bell to be non-violent;
- trial counsel knew that Enos Davenport could have testified that Bell was polite to the jailor who testified at trial that Bell threatened him;
- Aretta Terry could have testified that she never saw Bell use cocaine;
- Bell had no prior incarcerations for violent crimes;
- the two family witnesses counsel put on the stand were ineffectual;
- counsel's closing argument was sub-standard; and
- juror Greer's affidavit proved prejudice.

(JA 582-600). Bell presented the same state habeas affidavits from the following persons:

- both trial counsel;
- Marie Deans;
- his ex-wife;
- the Nicholsons; and
- Dawn Jones.

(JA 582-600). Without court-appointed experts or discovery, Bell presented the district court with the following new exhibits:

- greeting cards sent to Bell from his children and family in 2000 (JA 233-49);
- 8/18/00 unnotarized "statement" from Enos Davenport (JA 250);
- 5/11/05 affidavit from Aretta Terry saying Bell did not use cocaine (Bell's Exhibit No. 43 attached to his § 2254 petition in the district court);
- 5/12/05 affidavit from Swartz saying she told the truth at trial about the assault (JA 252);
- 5/12/05 affidavit from Starks-Cadet saying Bell was non-violent (JA 255); and
- 5/12/05 affidavit from Dr. Stejskal stating that he disagreed with the Virginia Supreme Court's definition of retardation and would have wanted to know that Bell was nicknamed "Nattyslow," did not graduate, and could not keep a job. (Bell's Exhibit No. 50 attached to his § 2254 petition in the district court).

On June 16, 2005, the Warden filed a Rule 5 Answer and Motion to Dismiss the petition, arguing that § 2254(d) required deference to the state court's decision and § 2254(e) permitted no hearing. She

argued that Bell's claim was defaulted because Bell never presented the state court with his new affidavits and allegations.

In response, Bell asserted as follows:

> The substance of Bell's claims was presented to the Virginia Supreme Court. . . . Any evidence presented in Bell's federal habeas brief only supplements and clarifies the state court records, *but does not fundamentally alter the legal claim considered by the Virginia Supreme Court*. . . .
>
> In his federal habeas brief, Bell makes the *same claim* again. . . . The crux of the argument is *exactly the same*. . . . Bell supplements his federal habeas petition with more examples of what might have been found, but *the same fundamental claim remains just as it was presented to the Virginia Supreme Court*. . . .

(Bell's 8/1/05 Brief in Opposition to Warden's Answer and Motion to Dismiss at 117-18) (Emphases added). The district court concluded on February 7, 2006, that, because Bell's new factual allegations were "not critical" to its decision, it would not rule on the Warden's default argument. *Bell v. True*, 413 F. Supp. 2d 657, 698 n.17 (W.D. Va. 2006) (CApp. 82a).

The district court entered the following order:

> I find Bell has presented a colorable claim that the Supreme Court of Virginia's decision denying this claim was an unreasonable

> determination of the facts in light of the evidence before it and an unreasonable application of the *Strickland, Williams, Wiggins,* and *Rompilla* line of Supreme Court precedent. *See* § 2254(d). However, I will refrain from making a final ruling on this issue until an evidentiary hearing is held and the relevant issues are developed more fully.

(CApp. 83a-84a). Without any explanation or discussion, the district court announced:

> Because Bell diligently developed the factual basis of this claim in state court, an evidentiary hearing is not barred by § 2254(e)(2). Bell's allegations of trial counsel's insufficient investigation and overlooked mitigation evidence constitute "facts that, if true, would entitle him to relief," *McCarver v. Lee,* 221 F.3d 583, 598 (4th Cir. 2000), and it appears from the record that "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." *Townsend v. Sain,* 372 U.S. 293, 313 (1963). Thus, I find that Bell is entitled to a hearing on this claim.

Id. The district court granted Bell's request for an investigator for the hearing, but denied his motion for a "mitigation specialist." (4JA 979-80).

Shortly before the hearing, trial counsel for the first time agreed to talk to the Warden's counsel and for the first time provided the Warden with Dr.

Stejskal's mitigation evaluation report prepared before trial for defense counsel. (JA 280). Based upon that report (JA 257) and the affidavit of trial counsel Fischel and Williams (JA 280), the Warden filed on June 13, 2006, a motion for summary judgment, arguing that the uncontradicted record demonstrated that the state court's judgment must receive the deference mandated by § 2254(d).[13]

Dr. Stejskal's pre-trial report was a comprehensive evaluation of Bell's background, character and mental condition (JA 257-58), detailed multiple interviews of Bell and his family (sisters Marjorie, Diane, and Norlene in Winchester, sister Nellie in Jamaica, and Tracey Nicholson) (JA 258-59), and referenced extensive testing. Dr. Stejskal provided a thorough description of Bell's personal history:

- Bell was the tenth of twelve children and his father and mother had children by various other men and women;
- his father and mother were absent much of the time due to work and his sister Nellie raised him;
- he grew up in a small town in Jamaica on family land surrounded by family;

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[13] The district court denied summary judgment after the subsequent hearing. (4JA 1270).

- his family attended church seven days a week and sang in the church choir;
- Bell used alcohol and marijuana heavily and his relatives gave him these drugs from an early age;
- he married Barbara in Jamaica;
- his mother emigrated here first and Bell emigrated here in 1992;
- Barbara gave birth to a daughter after Bell left;
- Bell sent his daughter gifts;
- he worked in the United States for his father and then for various employers;
- he fell in with the wrong crowd and had four other children here by two women;
- there were incidents of violence against Dawn Jones;
- there were incidents of violence against Tracey Nicholson;
- Officer Timbrook tried to break up a fight between Tracey and Bell on one occasion;
- Tracey said Bell was a good father even though he provided no child support; and
- his sister Nellie died suddenly in December, 2000.

(JA 268-76).

At the two-day hearing, Bell presented the testimony of:

- Carmeta Albarus, a "mitigation specialist" allowed to testify to her portrayal of Bell's life, over the objection of the Warden (JA 488);
- Craig Cooley, a lawyer presented as an expert *legal* witness over the Warden's objection, who admitted he knew nothing about Bell's case and testified generally about what he does in his capital cases (JA 401);
- Dr. Stejskal, who acknowledged his 12-page, single-spaced, pre-trial report, but disavowed any role as the mitigation expert he described himself to be in the report (JA 438);[14]
- Barbara Williams said Bell left her when she was pregnant, but wrote their daughter letters and sent her gifts (JA 591);
- Carol Anderson, Barbara's sister who said Bell lived with her and did household chores (JA 601);

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[14] Bell's trial counsel were "flabbergasted" at Dr. Stejskal's habeas disavowal of the excellent work he actually had performed. (JA 648). The district court inexplicably found "it was unreasonable to depend upon Dr. Stejskal to do an investigation of the nature required." (JA 802).

- Dawn Jones said Bell helped her with medical problems when their daughter was born, was upset by his mother's medical problems, used physical violence against her 3 or 4 times and brandished a gun during an argument (JA 540-53);
- Joanne Nicholson said Bell was a "very nice" person and that Billie Swartz's trial testimony about the assault was a lie (JA 562, 564);
- Precious Henderson, a co-worker at one of Bell's jobs who said Bell was "pretty good to get along with," but who did not know Bell had been fired for falsifying a drug-screen test (JA 585, 171); and
- Marie Deans, the trial-level "mitigation specialist" who caused trial attorney Snook to have to withdraw because she did no work on the case (JA 484).

Bell was not at the hearing and did not testify. His legal team presented no evidence from Tracey Nicholson, Enos Davenport, Aretta Terry, Billie Swartz, Rosa Starks-Cadet or Bell's children. The district court held inadmissible the many "affidavits" Ms. Albarus said she had procured in Jamaica from alleged character witnesses, as well as Ms. Albarus' lengthy "report" detailing her hearsay version of Bell's life. (JA 802-03).[15]

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[15] Ms. Albarus was a social worker who was criticized for taking credit for another's work in *State v. DiFrisco*, 804 A.2d

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The Warden presented Bell's trial attorneys, Fischel and Williams, to explain the circumstances of the case, their efforts to defend Bell and the strategies they employed. (JA 626-757). Counsel explained in great detail the "whole context about this case that made mitigation itself very difficult." (JA 643-47). Bell presented one witness in rebuttal: Dr. Cunningham, a psychologist, who testified over the Warden's objection as to his opinion of how trial attorneys should try cases. (JA 759).[16] The district

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507, 549-50 (N.J. 2002). (JA 519-20). According to her, Bell enjoyed a wonderful life in Jamaica and was loving to Barbara before he moved to the United States. She said Bell was nicknamed "Slow" in Jamaica but admitted this could be because he was considered lazy. (JA 504). She admitted that Bell was not considered retarded in Jamaica. (JA 506). She admitted that Bell had not been abused or neglected by anyone, and that his father provided well for the family. (JA 525-26). Dawn Jones told Ms. Albarus that Bell had beaten her. (JA 533). Bell's sisters told Ms. Albarus that Bell was a "mama's boy," Bell was not abused physically or sexually, and Bell's father provided well for the family. (JA 525-26). Ms. Albarus said she found two law enforcement witnesses in Jamaica to say Bell really liked police officers, but admitted she never told them that Bell had threatened to kill sheriff's deputies, dealt drugs, and murdered a police officer. She conceded if those facts were true, then Bell was a different person than she had been led to believe. (JA 533-35). Ms. Albarus charged Bell's habeas counsel at least $20,000 (JA 533), an amount it was undisputed that the trial court never would have authorized for mitigation services at the time Bell was tried. (JA 719, 733).

[16] Bell did not offer into evidence Dr. Cunningham's pre-hearing report, although he now relies upon information in that document which was not considered by the district court. (Bell's Brief at 3, 14, 15, 47, 50, 52).

court did not credit Ms. Albarus, Dr. Cunningham, Mr. Cooley, or Ms. Dean.

At the conclusion of the hearing, the district court announced its ruling from the bench, deeming trial counsel's performance professionally unreasonable in not finding and using Barbara Williams, Dawn Jones, Carol Anderson, Joanne Nicholson, and, of "lesser importance," Precious Henderson. (JA 799-800). The court, however, found that Bell had failed to prove he was prejudiced. (JA 803-04). The district court's ruling was made without any reference to the Virginia Supreme Court's judgment, to § 2254(d)'s requirement of a reasonableness determination, or to its own pre-hearing ruling stating that it would refrain from making any decision on the reasonableness of the state court's decision until after the hearing.

In the Court of Appeals, Bell presented no argument that his federal claim was "new" and thus had not been "adjudicated on the merits in State court" under § 2254. He emphasized that "the district court was unhindered by the strictures of the AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996]" because the district court had allowed him an evidentiary hearing; not because he had argued, or the court had found, that his claim was "new." (Bell's 7/13/07 opening CTA4 Brief at 38). Bell's argument was a straightforward merits complaint that the district court should have found prejudice.

He did not argue that the district court erroneously applied § 2254(d) or deferred to the state court. As was obvious from the record and to the parties who appeared in the district court and heard that court's oral decision, the district court in fact adjudicated Bell's claim *de novo* on its merits. Indeed, the Warden argued to the Fourth Circuit that, while the district court's ultimate judgment finding no prejudice was correct, it nevertheless should be upheld on different grounds because the district court had *erred in holding an evidentiary hearing and in finding independently* that Bell's trial counsel's performance had been professionally unreasonable. The Warden argued that § 2254(d) required dismissal of the claim.

The Fourth Circuit issued an unpublished decision denying relief on January 4, 2008. *Bell v. Kelly*, No. 06-22, 2008 U.S. App. LEXIS 125 (4th Cir. 2008) (CApp. 17a). The court expressly declined to rule on the issue of whether an evidentiary hearing properly had been authorized, "[b]ecause we find that counsel's performance did not prejudice Bell." (CApp. 11a-12a). The court expressly refrained from addressing the reasonableness of counsel's performance under the first part of the *Strickland* test because Bell had not demonstrated prejudice. (CApp. 14a). The Fourth Circuit ruled that the

Virginia Supreme Court reasonably found no prejudice under § 2254(d). (CApp. 14a-17a).[17]

On January 18, 2008, Bell filed a petition for rehearing, complaining that the Fourth Circuit should not have applied § 2254(d) and for the first time asserting that he was allowed to develop new evidence to support his claim. He did not assert that his claim was a "new" claim. (Bell's 1/18/08 Petition For Rehearing at 3-4). On January 29, 2008, the Fourth Circuit denied Bell's petition for rehearing with no judge of the court requesting a poll on Bell's petition for rehearing *en banc*. (CApp. 178a).

On February 14, 2008, the state trial court scheduled Bell's execution for April 8, 2008. In his petition for a writ of certiorari, Bell argued that § 2254(d) should not apply to his claim because he was allowed to develop *additional evidence* on that same claim, not because it was a *new* claim. (Pet. Cert. 21: "By strictly applying § 2254(d)'s unreasonable-application standard *to a claim of prejudice heavily predicated on evidence newly received* on federal habeas. . . ."). (Emphasis added). After the Governor reprieved Bell's execution date, this Court, on May 12, 2008, stayed Bell's execution

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[17] In a footnote, the court ruled that, because the district court had mentioned § 2254(d)'s deference standard in its pre-hearing order, the district court implicitly must have employed that standard at the conclusion of the hearing (CApp. 12a), the record and the parties' understanding to the contrary notwithstanding. (JA 797-804).

and granted certiorari on his Question 1. *Bell v. Kelly*, 128 S. Ct. 2108 (2008).

SUMMARY OF ARGUMENT

Bell's arguments that his federal claim of inadequate mitigation investigation was "new" and thus outside the purview of 28 U.S.C. § 2254, and that the Constitution requires state habeas corpus courts to hold evidentiary hearings on such claims, were not presented below or encompassed in the grant of certiorari. They therefore should not be considered.

Bell's state court claim remained substantially the same, factually and legally, in federal court. It was not "new" such that § 2254(d) would not apply. The only error in this case was the district court's permitting an unauthorized hearing and then second-guessing the state court on the *Strickland* performance prong. The Fourth Circuit's consideration of Bell's evidence and independent determination of no prejudice rendered its additional application of § 2254(d) superfluous.

Section 2254 presents an orderly, easily-understood, decisional framework for federal courts to apply when reviewing state court criminal judgments. Congress intended to expedite implementation of state court decisions which are not constitutionally unreasonable, recognize and codify the role of the state courts as co-equal to the federal

courts, and replace the *Townsend v. Sain*, 372 U.S. 293 (1963), standard of reviewing the "fairness" of the state court *process* (and intrusive, duplicative federal court hearings) with a more workable standard of reviewing the state court *decision* to see if it lies outside all constitutional parameters. The language of § 2254(d) and (e) plainly and unambiguously prohibits federal court hearings unless the state court decision was unreasonable.

All of the evidence supporting Bell's federal court claim was within Bell's own knowledge and possession. Thus, Bell cannot have "diligently developed" in state court his later-augmented, federal court evidence such that he merited the narrow statutory exception allowing for a federal hearing. The ultimate decision, finding just as the state court had found, that Bell's weak mitigation would have made no difference, only highlighted the waste of judicial resources expended in a duplicative federal hearing. All judges to consider Bell's case have agreed that his alleged mitigation was weak and made no difference in his case.

ARGUMENT

28 U.S.C. § 2254 Does Not Permit *De Novo* Review Of Bell's Claim.

Bell asks this Court to indulge the fiction of calling his federal claim a "new" claim. This is the foundation upon which he builds his entire argument.

Only by this fiction can Bell mount any argument to escape the mandate of § 2254(d). Fiction is necessary to escape the error committed by the district court in holding an evidentiary hearing in the first place. Without the fiction, the only issue in Bell's case with respect to his inadequate mitigation investigation claim is whether the state court's decision was unreasonable. On that point, the result is not even close: all eleven judges who have looked at Bell's claim – including the district court judge who never should have allowed a hearing – agree that Bell has not shown prejudice. Consequently, the state court's decision cannot have been unreasonable. Bell's proposal, that this Court accept his fiction and rewrite § 2254 to include a "new claim" exception, is necessary for him to obtain a reversal of the Fourth Circuit's judgment. This argument is contrary to the record, the statute, and the intent of Congress. It would mark a sea change in federal habeas corpus to the certain detriment of principles of federalism.

1. Bell's "new claim" proposal was not presented below and also is contrary to what he argued below.

Bell argues that the Fourth Circuit erred in applying 28 U.S.C. § 2254(d)'s standard of deference to his claim of inadequate mitigation investigation because the claim allegedly was not, as required in the opening sentence of § 2254(d), "adjudicated on the merits in State court." He posits that § 2254(d) means that, whenever an inmate adds "significantly new

evidence" to an ineffective assistance claim which he first adjudicated in state court, the claim mutates into an entirely "new" claim of constitutional error in federal court, free from the constraints of § 2254(d).

Bell expressly argued in the district court that his federal claim did *not* "fundamentally alter the legal claim considered by the Virginia Supreme Court" and that it was, in fact, "exactly the same" claim. (Bell's 8/1/05 Brief in Opposition to Warden's Answer and Motion to Dismiss at 117-18). Bell certainly did not back away from that position in the Fourth Circuit. There he presented a straightforward merits argument, simply disagreeing with the district court's independent merits determination of no prejudice, and noting, as the record certainly showed, that the district court believed it was "unhindered" by § 2254(d). (Bell's 7/13/07 Opening Brief, CTA4 at 38).

After the Fourth Circuit found no prejudice, and upheld the reasonableness of the state court's decision under § 2254(d), Bell argued for rehearing, asserting that the Fourth Circuit should not have applied § 2254(d) to his claim because it had declined to do so in *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003). In *Monroe*, the Fourth Circuit concluded that *Brady* violations had been newly-discovered in the federal habeas proceeding. 323 F.3d at 297-98. Still, Bell did not make the "new claim" argument which he presses now.

The Fourth Circuit had no opportunity even to consider Bell's current argument. This Court should

not entertain it as grounds for possible reversal of the judgment below. *See, e.g., Yee v. Escondido*, 503 U.S. 519, 533 (1992) (refusing to address claims not raised below); *Carlson v. Green*, 446 U.S. 14, 17 (1980) (Court does not normally decide issues not presented below). Furthermore, his new proposal is not encompassed in the question upon which the Court granted certiorari and, for that additional reason, should not be considered. *See* U.S. Sup. Ct. Rule 14(1)(a); *Yee*, 503 U.S. at 535-38.

2. Neither Bell's claim nor the facts to support it were "new."

a. Bell's claim was not "new."

The Warden does not dispute that *de novo* review in a § 2254 action might be authorized on issues which were properly preserved in the state court but, through no fault of the inmate, were not adjudicated by the state court. *See Wiggins*, 539 U.S. at 534 (federal court free to decide *Strickland* prejudice *de novo* because state court never reached the issue).[18] Neither does the Warden dispute that *de novo* review in a § 2254 action might be authorized on claims which the inmate did not present to the state court, or which were presented but found defaulted, if the inmate can prove "cause and prejudice" or "actual

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[18] Of course, subsidiary fact-finding by the state court still must be presumed correct under § 2254(e)(1). *See Bradshaw v. Ritchey*, 546 U.S. 74, 79-80 (2005) (federal court required to apply § 2254(e)(1) presumption of correctness).

innocence" to overcome the default. *See Michael Williams v. Taylor*, 529 U.S. 420, 444 (2000) (sufficient "cause" to overcome default of new federal court claims of juror bias and prosecutorial misconduct); *House v. Bell*, 547 U.S. 518, 522 (2006) ("actual innocence" overcomes default).

Bell's claim which was addressed by the district court, however, fit none of these scenarios because it was not "new" or different from the claim he presented to the Virginia Supreme Court, as Bell explicitly admitted in the district court. *See also* CApp. 82a (district court expressly declining to consider Bell's factual allegations newly made in federal court, albeit without deciding whether defaulted). When the district court decided to hold an evidentiary hearing, it was looking at *the identical* record considered by the Virginia Supreme Court and the claims were the same.

Then, at the hearing, the district court permitted Bell to expand his allegations to include testimony from witnesses Bell had chosen not to present to the state court: Carmeta Albarus; Craig Cooley; Carol Anderson; Precious Henderson; and Dr. Cunningham. Of these, only Anderson and Henderson were fact witnesses, testifying that Bell was helpful around the house (JA 601) and "pretty good to get along with" at work. (JA 585). Bell's choice to add these known but previously unasserted items of "mitigation" allegedly not investigated did not automatically *transform* the nature of his asserted constitutional violation.

Bell relies heavily on *Michael Williams* for the proposition that a hearing and *de novo* review are required for claims which really are newly made in federal court.[19] But Bell's ineffective assistance claim is fundamentally different from the *Michael Williams* prosecutorial misconduct and juror bias claims. Those claims were completely new in federal court and rested on evidence that Williams could not have known in state court. A *Strickland* claim of ineffective mitigation investigation is never in any sense a claim involving misconduct by a prosecutor or state official.

In juror or prosecutorial misconduct cases, forces outside the inmate's control can prevent the petitioner from being able to know about certain facts underlying his claim and, upon a proper showing of "cause," *de novo* review of the new matters is authorized. This Court found in *Michael Williams* that Congress never intended § 2254(e)(2)'s "failed to develop" language to insulate from federal court review a claim for which the prosecutor concealed facts. *Michael Williams*, 529 U.S. at 434-35. Claims of inadequate mitigation investigation, on the other

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[19] Bell relies on *Price v. Vincent*, 538 U.S. 634 (2003), but there the Court found error in the federal court's *de novo* review of the same claim determined by the state court. He also relies on *Gonzalez v. Crosby*, 545 U.S. 524 (2005), but there the Court was determining whether a claim fit within F.R.C.P. 60(b), not § 2254(d). Bell's further reliance on *Vasquez v. Hillary*, 474 U.S. 254 (1986), a pre-AEDPA case, cannot help him because there the Court found that the petitioner's claim was the same claim in federal and state court.

hand, and especially ones involving the defendant's own background, entail facts known by the defendant, and sometimes known exclusively by the defendant as occurred in this case. The rule in *Michael Williams* cannot be construed so broadly as to constitute a rule of automatic amendment of *Strickland* ineffective assistance claims that would eviscerate the carefully balanced approach Congress intended in § 2254(d).

If this Court were to hold that Bell's federal claim is entitled to *de novo* review because it is a different claim from the one he presented to the state court, then there is no limit to "new" claims subject to *de novo* review in federal court. Virtually every inmate alleging ineffective assistance of counsel could meet the test *because it is almost always possible to find an uninterviewed witness or unread document. See Wiggins,* 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case").

Bell's vague, amorphous "significant new evidence" standard is no standard at all. It would throw the federal courts into perpetual uncertainty about a claim while trying to sort out the "new" claims from the often augmented or re-formed ones routinely made by capital and non-capital § 2254 petitioners, both *pro se* and counseled. Indeed, it is the very prospect of getting a second bite of the

collateral review apple – habeas corpus standing alone in allowing for *two separate, co-equal court systems* to review the same matter – that even now encourages unsuccessful petitioners in state court to change how they present their same claims in federal court, or to withhold claims or supporting facts from the state courts.

Many inmates attempt to improve the presentation of their claims to the federal court instead of relying only on the same arguments and supporting factual allegations they used unsuccessfully in state court. The rule of *de novo* review Bell proposes at the very least would send mixed signals to the lower federal courts about when procedural default rules, hearings and *de novo* review should be applied to such new matters. But about Bell's claim there should be no confusion: it is the paradigmatic example of a claim that Congress intended would be reviewed with deference in federal collateral proceedings.

b. Virtually all of Bell's facts were not "new."

A comparison of Bell's evidence presented in state and federal court shows on its face that Bell did not present a "new claim." (*Compare lists above, pages* 14-15 *to* 19-20, 25). And Bell utterly fails in his attempt to identify "new" evidence. (Bell's Brief at 39-51).

He says that he presented new evidence from four witnesses to the federal court that he was not

violent. (Bell's Brief at 43). Ms. Albarus testified that the witnesses to the Jamaican assault offense told her that the incident involved a "scuffle" in which Bell tore the victim's shirt. (JA 513). This was not new: trial counsel knew it and brought it out on cross-examination of the police officer. (JA 105-06).[20]

Ms. Henderson, the witness the district court found "of lesser importance" than the other witnesses (JA 800), said she worked with Bell and never saw him with a gun or being violent or selling drugs. (JA 584). This evidence was not new: Bell presented to the state habeas court affidavits from two witnesses who said Bell was not violent and did not carry a gun. (JA 188, 190-91).

Barbara Williams, Bell's ex-wife, testified at the federal hearing that murder was not in character for Bell. (JA 593). This witness was not new: Bell presented her affidavit to the state habeas court which assumed her allegations to be true. (JA 186). It was Bell's choice as to *what* he wanted to include in her affidavit to the state court.

Ms. Anderson, Bell's ex-wife's sister, testified at the hearing that Bell was not violent, did not carry a gun or get into fights or hold animosity towards police

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[20] Ms. Albarus' hearsay accounts would not have been admissible in a Virginia sentencing hearing. *See Wright v. Commonwealth*, 427 S.E.2d 379, 392 (Va. 1993), *vacated on other grounds*, 512 U.S. 1217 (1994); *Buchanan v. Commonwealth*, 384 S.E.2d 757, 773 (Va. 1989), *cert. denied*, 493 U.S. 1063 (1990).

officers in Jamaica before he emigrated here. (JA 603). Again, this was not new: the state habeas court considered Bell's affidavits from similar witnesses saying he was not violent, the only difference being that those state court witnesses spoke of his more relevant behavior *in the United States*. (JA 188, 190-91).

Bell relies on four witnesses who testified in federal court that Bell liked police officers. This evidence would be laughable were it not so offensive in this case in which overwhelming evidence established that Bell shot an officer he hated in the face because he thought the officer wore a bullet-proof vest. Ms. Albarus presented inadmissible hearsay stating that a police officer in Jamaica, *who was Bell's own niece*, "did not indicate" any problems with Bell. (JA 513-14). Bell did not present this evidence to the state court.

Joanne Nicholson testified that she never saw Bell threaten a police officer, and his ex-wife, Barbara, testified that Bell had police officer friends before he moved here. (JA 578, 588-89). With the exception of Albarus, Bell *did* present affidavits from these very same witnesses to the state court. (JA 186, 190). Again, it was Bell's choice as to *what* testimony he wished to present through them to the state court. Lastly, Bell relies on the testimony of Ms. Anderson that Bell had no animosity towards police officers in Jamaica (JA 603), evidence Bell inexcusably chose not to present to the state court.

Bell also relies on the unnotarized "statement" from Enos Davenport disputing Officer Robinson's own sworn testimony at trial that Bell threatened him. (JA 250). Davenport's "statement" certainly is not "new;" it is dated August 18, 2000, *before the trial itself*. Bell chose not to present this "statement" to the state court, *see Michael Williams*, 529 U.S. at 437-38 (prisoner's fault in not presenting full facts to the state court prohibits federal evidentiary hearing), and also chose not to present Davenport as a live witness at the federal hearing. Bell's deliberately untested, unpresented evidence certainly cannot be considered "new."

Finally, Bell tries to recast as "new" the same evidence from Joanne Nicholson and Dawn Jones that he presented in state court, simply because it was *live* testimony, more "vibrantly" presented than when the same words were *read* by the state court. (Bell's Brief at 44). Quite obviously, evidence from witnesses in a habeas hearing, held years after a death sentence has been imposed, is not assessed for its "vibrancy," but rather for the establishment of facts which trial counsel supposedly did not find. When a court has presumed alleged facts to be true, there is nothing further to be established. Bell was in a better position in state court with his allegations accepted as true than he was in federal court with a burden to prove them true.

Bell concedes, as he must, that his allegation of abuse "was less extreme than the abuse at issue in *Terry Williams*, *Wiggins*, and *Rompilla*." (Bell's Brief

at 47-48).[21] The factual assertions which underlay the claim of "abuse" were not "new" even to trial counsel: Bell's sisters told Dr. Stejskal that they were whipped for wrong-doing and Bell told Dr. Stejskal that he got the worst of it. (JA 269-70, 422). Dr. Stejskal reported this to trial counsel. (JA 269-70).

Bell now alleges that he was beaten with belts, cords and other instruments, and deprived of food (Bell's Brief at 47), but he obviously knew this all along. However, Bell tendered *none of that evidence* at the hearing in which he was required to prove his claims. Instead, in this Court, he relies on a hearsay "report" prepared by Dr. Cunningham *that never was admitted into evidence in any court or subjected to*

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[21] Williams had a "nightmarish" childhood of horrific abuse and neglect, his parents had been imprisoned for the neglect, Williams was sent to live under social services protection, and he was "borderline retarded." *Terry Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). Wiggins was severely physically abused and molested repeatedly by his mother and a series of foster parents. *Wiggins*, 539 U.S. at 517. Rompilla's parents were violent alcoholics who beat him, locked him in a dog pen, and deprived him of living essentials, and he suffered from brain damage and extreme mental disturbance. *Rompilla v. Beard*, 545 U.S. 374, 392 (2005). By contrast, witnesses told Ms. Albarus and Dr. Stejskal that the Bell children got whippings for being lazy and not doing chores, and Bell's own sisters claimed that Bell was the favored only son and a "Mama's boy" who got the best treatment. (JA 269-70). Bell's sisters also said that their parents provided well for the family and that the whippings were not "abuse," but rather expected discipline. (JA 269). Finally, Bell and his sisters, when asked by trial counsel about physical or sexual abuse, denied both. (JA 726).

evidentiary testing. (Bell's Brief at 47, citing JA 307, 323, 326). That evidence simply was no part of the claim Bell presented in any of the courts below. It certainly should not be considered for the very first time in the highest Court in the land.

Bell also points to Dr. Stejskal's testimony that "there was [*sic*] questions of . . . abuse he experienced at the hands of his father," but that brief mention was merely an acknowledgement of what Dr. Stejskal already had relayed to trial counsel before trial. (JA 422, 269-70). Lastly, Bell relies on Ms. Albarus' hearsay testimony that Bell was beaten. (JA 505). However, even Ms. Albarus had to admit that the word "beat" was not used by her informants; Bell was "disciplined" when he was lazy. (JA 505). Ms. Albarus admitted that there was no "abuse" in the Bell household as that term is understood in her field of social work. (JA 525).

Bell next says that "new" evidence of his "good" character was presented in the federal court hearing by way of four witnesses and greeting cards sent to him by his children. (Bell's Brief at 48-49). Bell neglects to mention that he never attempted to offer the greeting cards into evidence in his § 2254 case and that, as a result of his failure of proof, they form no part of the claim decided below. They are not new as shown by their pre-trial and during-trial dates. (JA 236-480).

Bell's federal habeas witnesses consisted of his ex-wife Barbara, Barbara's sister, ex-girlfriend Dawn Jones, ex-girlfriend's mother Joanne Nicholson, and a co-worker from 1992 to 1998, Precious Henderson. Their beliefs that Bell was a good father to his five children and a good employee are not new evidence. Aside from the fact that Bell himself was aware of them, Ms. Williams and Ms. Nicholson presented these same statements to the state court which assumed the allegations true. (JA 186-89, 229).

No "new" facts were presented to the federal court in the form of "expert" witnesses. (Bell's Brief at 50-51). Dr. Stejskal was not an expert witness in federal court; he was a fact witness testifying about his own mitigation investigation and assistance to trial counsel. (JA 410-67). Mr. Cooley and Dr. Cunningham presented no factual evidence at all. (JA 372-410, 757-69). Instead, the district court permitted them, over the Warden's objections, to testify about their opinions on what defense attorneys should do in capital cases. Even under Bell's theory, even denying § 2254(d) deference to a decision that did not take into account "new" mitigation evidence allegedly discovered later in federal court, and even assuming diligence in the state habeas proceeding, this is not "new." Opinions of lawyers or psychologists on the value of particular items of evidence is simply not "new evidence" of anything.

Indeed, the record establishes that the "new" facts heard by the district court were the same allegation the state court had considered and

assumed true. Bell presented no new information about which trial counsel were unaware.

3. Section 2254(d)'s language and history demonstrate its applicability to Bell's claim.

a. The language of § 2254(d) applies to Bell's claim.

Bell came to federal court claiming that trial counsel failed to investigate mitigating evidence about his background and character. He insisted that it was "exactly the same" claim he had presented to the state court. (Bell's 8/1/05 Brief in Opposition to Warden's Answer and Motion to Dismiss at 117-18). Under those circumstances, the district court was faced with a very simple menu of decisional choices.

First, federal habeas corpus is not available merely to reconsider reasonable state court judgments on the same claim. A federal habeas court is required to decide if the applicant has shown that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Terry Williams*, 529 U.S. at 413, this Court said that provision means that "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially

indistinguishable facts." Only if the applicant demonstrates that the state court decision does not merit statutorily-mandated deference may the federal court then determine the claim *de novo*, subject, of course, to the presumption of correctness mandated by § 2254(e)(1) to be applied to any factual findings by the state court.

Second, federal habeas corpus review is not available merely to reconsider reasonable fact-finding made by state courts. The applicant must demonstrate that the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In *Terry Williams*, 529 U.S. at 413, this Court said that provision means that "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Accord Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (relief only if state court applied law to facts in objectively unreasonable manner). Only if the applicant shows that the state court decision unreasonably decided the facts presented may a federal court determine the claim *de novo*.

There is no provision in § 2254, or in this Court's precedents interpreting it, that permits a federal habeas court to hold an evidentiary hearing to "see

if" the state court decision was reasonable.[22] The § 2254(d) determination is an all or nothing proposition: if not unreasonable, the claim must be dismissed; if unreasonable, the federal court may determine the claim *de novo*.

Third, if the inmate presents a truly new claim in a § 2254 proceeding that he did not present to the state court, the determination of that new claim falls outside the scope of § 2254(d), and is governed by the settled doctrine of procedural default. The inmate must demonstrate that he has "cause" for his failure to present the new claim in state court and resulting "prejudice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("The procedural default doctrine and its attendant 'cause and prejudice' standard are 'grounded in concerns of comity and federalism,' *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), and

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[22] In *Valdez v. Cockrell*, 274 F.3d 941, 950-52 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002), the Fifth Circuit held that the AEDPA did not permit an assessment of whether the state court process was "full and fair," and that to so hold would "have the untenable result of rendering the amendments enacted by Congress a nullity." In response to the inmate's objection that the court's holding would render "impotent an evidentiary hearing held" in federal court, the Fifth Circuit found that § 2254(d) deference still is required even when a hearing has been held that is not barred by § 2254(e)(2), because such a hearing "may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)." *Accord Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir.), 537 U.S. 956 (2002); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005).

apply alike whether the default in question occurred at trial, on appeal, or on state collateral attack, *Murray v. Carrier*, 477 U.S. 478, 490-492 (1986)"). If the applicant demonstrates "cause and prejudice" or "actual innocence," *see Schlup v. Delo*, 513 U.S. 298, 329 (1995), then the § 2254 court may consider the new claim *de novo*. If the applicant does not demonstrate these exceptions to the procedural default rule, then the § 2254 court must refuse to consider the defaulted claim.

Even if the inmate demonstrates that the state court decision was unreasonable under § 2254(d), the federal court still "shall not hold an evidentiary hearing" on newly-asserted facts unless the inmate demonstrates that he did not fail "to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In *Michael Williams*, 529 U.S. at 435-36, this Court held:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. . . . Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or

> factual basis of the claims *did not exist* at the time of state-court proceedings. (Emphasis added).

See also id. at 433 (holding that § 2254(e)(2) preserved the holding in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992), that inmates "who are at fault for the deficiency in the state court record must satisfy a heightened standard to obtain an evidentiary hearing" and that Congress "raised the bar" by requiring non-diligent inmates to show cause under § 2254(e)(2)(A)&(B) and eliminating the freestanding innocence exception).

If the inmate successfully demonstrates unreasonableness, "cause and prejudice" and diligence under *Michael Williams*, and the federal court determines that a hearing is necessary to resolve disputed facts, the federal court obviously would have to decide the existence of new facts, credibility of new witnesses, *etc.*, as a *de novo* matter, because the state court will not have considered such matters. But the district court under no circumstances may hold a hearing on a claim already decided by the state court unless the inmate demonstrates unreasonableness under § 2254(d) and, even then, the hearing may not stray from the claim or facts already presented to the state court. It is a *de novo* determination of an unreasonably decided claim. If the inmate wants the federal court to *expand* on the facts addressed by the state court in its unreasonable decision, then Congress makes it express that the federal court *may not hold a hearing*

unless the prisoner shows that (1) he was diligent but the facts did not exist when he was in state court, *see Michael Williams*, or (2) he was not diligent but has cause for his default and he is innocent. *See* § 2254(e)(2)(A)&(B).

The district court here ruled that Bell had made a "colorable claim" of unreasonableness based on its own re-analysis of the same claim and evidence already decided by the state court. It thus announced it would hold a hearing to see if the state court decision was unreasonable. (CApp. 83a). Nothing in § 2254(d) permitted such review of the state court's decision.

b. The legislative history of § 2254(d) demonstrates that it was intended to apply to Bell's claim.

In *Wright v. West*, 505 U.S. 277, 284 (1992), this Court *sua sponte* directed the parties to address the issue of deference versus a *de novo* standard of review. The Court was split over the issue. Justice O'Connor expressly noted, in her concurring opinion joined by three Justices, that Congress had grappled with the issue but had been unable to decide whether the standard of review should be changed from *de novo* to deference to reasonable state court decisions. *Id.* at 305.

Four years later, Congress settled the issue when it passed the AEDPA, expressly changing the standard of review of all issues, legal and mixed law

and fact alike, from *de novo* to the reasonableness standard sought by the petitioners in *West*. *See Bell v. Cone*, 535 U.S. 685, 693 (2002) (AEDPA purpose is to prevent federal retrials and ensure that state court convictions are given effect). In AEDPA, Congress also abrogated *Townsend v. Sain*'s holding about when evidentiary hearings are permitted and required in § 2254 cases. Section 2254(e)(2) now governs when a hearing can be held. It does not permit the federal court to engage in a *Townsend* "full and fair" assessment of the mechanism selected by a state legislature and employed by a state court to decide a claim. Congress jettisoned altogether the statutory exceptions to the presumption of correctness, including the prior "full and fair" factors. *See Valdez*, 274 F.3d at 949.

Amici National Association of Federal Defenders and National Association of Criminal Defense Lawyers (NAFD & NACDL) argue that federal court review is the "backstop for inadequacies of state process" and therefore that Congress must have intended in the AEDPA for federal courts to assess whether the state court proceeding was "full and fair." Brief for Amici NAFD & NACDL at 27. Relying on congressional debates of pre-1996 bills, they posit that Congress simply re-described the standard as one of "reasonableness" in order to trick those opposed to "full and fair" into voting for it. *Id.* at 18-20.

There is no rule of statutory construction which supports Amici's hidden treasure theory.[23] Congress expressly rejected the "full and fair" standard and rejected imposing an obligation on federal courts to assess state court proceedings for fullness and fairness. If Congress secretly intended to smuggle a "full and fair" standard back into § 2254(d), after expressly rejecting it, it has kept that secret well. In fact, the "full and fair" standard was rejected because members of Congress saw it as an almost complete elimination of federal habeas review, just as that standard had curtailed Fourth Amendment claims after *Stone v. Powell*, 428 U.S. 465 (1976), was decided. *See generally,* 141 Cong. Rec. S. 7833 *et seq.* (debating Kyl amendment to require "full and fair" standard). Senator Kyl's amendment was rejected on June 7, 1995. S. Amdt. 1211 to S. 735, S. Roll Call 240. Senator Biden's amendment to delete the standard of deference to state courts likewise failed on the same day. S. Amdt. 1224 to S. 735, S. Roll Call 241. Bell's amici simply misstate the legislative history, preferring instead to rely on the views of agenda-driven habeas commentators and congressional members whose proposals to maintain *de novo* review ultimately were rejected by Congress.

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[23] It also is contrary to Congress' intent to codify this Court's holding that "[t]his argument is premised on a skepticism of state courts that we decline to endorse. State courts are co-equal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

c. Bell's theory of statutory construction is without merit.

Bell mistakenly relies on *Michael Williams* simply because this Court there permitted a federal hearing and *de novo* review. In *Michael Williams*, the petitioner could not be faulted for failing to develop his juror misconduct claims in state court because he established that prosecutorial misconduct denied him the very evidence upon which his new claims were based. 529 U.S. at 440-41. This Court held that the "underdevelopment of these matters was attributable" to the juror and the prosecutor alone and that Williams thus could not have "failed to develop" the evidence in state court because he could not have known about it. *Id.* at 443-44. The Court's interpretation of § 2254(e)(2), rejecting a no-fault reading of "failed to develop," was necessary to avoid a "harsh reading, which would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court." *Id.* at 434-35.

Bell's case simply does not fit into *Michael Williams*. Michael Williams was entitled to a hearing and *de novo* review in federal court on a claim that he could not, as a matter of fact, have found earlier due to prosecutorial misconduct. The same cannot be said about a claim that counsel failed to investigate petitioner's ex-wife, ex-girlfriends and friends who always were known to the petitioner. Therefore, there is no comparison to evidence withheld by a

prosecutor. *See Michael Williams*, 529 U.S. at 437-38 (finding no diligence in developing a *Brady* claim that a co-defendant's psychiatric report had been withheld because petitioner had the report during his state habeas case but did not present it to the state court).

Apart from *Michael Williams*, Bell only relies on several lower court decisions which have ruled similarly to *Michael Williams* that, when the new claims have involved extrinsic roadblocks to the petitioners' development of the claims in state court, § 2254(e)(2) will not bar factual development in federal court.[24] *See Monroe*, 323 F.3d at 297-99; *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006); *Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002).[25] Indeed, the courts which have held that the AEDPA deference standard applies to state court adjudications regardless of whether the federal court has held a hearing, have pointed out that it is only in

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[24] Contrary to Bell's contention, *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*), did not hold that *de novo* review was required for new facts developed on an old claim; rather, it assumed "*arguendo*," that if *de novo* review ever would be appropriate for such new facts, it would not be appropriate where the inmate had not been diligent under § 2254(e)(2). 542 U.S. at 653.

[25] Bell also relies on *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003), as a case applying the *Michael Williams* rule to a claim of *Strickland* ineffectiveness. (Bell's Brief at 25). He is wrong. The court determined that the state court's defaults of *Strickland* claims were not adequate and independent and thus the federal court had no merits decisions to which it could defer. 317 F.3d at 1212.

the *Brady*, or similar prosecutorial misconduct, context where the federal courts have held that *de novo* review is appropriate. *See Valdez*, 274 F.3d at 950-52; *Pecoraro*, 286 F.3d at 443; *Matheney*, 377 F.3d at 747.

Bell confusingly argues that only his adaptation of § 2254(d) can empower a federal court to give effect to evidence which will be developed in a federal hearing. (Bell's Brief at 34). If Bell means to say that a federal court may not consider new factual development when deciding whether the state court decision was reasonable, then he is correct. Congress intended that such factual development as practiced in the past must cease. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2005) (Congress placed more, rather than fewer, restrictions on the power of the federal courts to grant writs). But Congress also saw no reason for the federal courts to defer to *unreasonable* state court decisions and thus permitted *de novo* review of claims so decided.

Bell clearly sees some independent grant of authority in § 2254(e)(1) and (2) to hold a hearing, but it is not there.[26] Congress did not intend for those statutes to swallow its intent in § 2254(d) that constitutionally reasonable state court decisions be left alone. Section 2254(e)(2) is an express, categorical

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[26] Amicus Former State Court Judges likewise mistakenly sees § 2254(e) as supplanting § 2254(d)'s standard of review instead of as the express bar to review which it clearly is. Brief for Amicus Former Judges at 5-6.

bar to a hearing unless its narrow exceptions are met. *Michael Williams* did not expand that statutory mandate, but rather made clear that the statutory bar would not apply to the specific circumstances of that case.[27]

Bell must not have thought his "new claim" theory through. If Bell is correct, and his claim is "new," then it is defaulted and may not be considered by the federal courts because it never was presented to the state court. *See Gray v. Netherland*, 518 U.S. 152, 162 (1996). In his discussion, he simply ignores "cause and prejudice" for that default. And, indeed, he never could demonstrate those prerequisites to federal court review because *nothing* prevented him from presenting the state court with all of the "new" evidence he now says he presented to the federal court.

Finally, Bell's "policy interests" argument must be seen for what it is: a request that this Court rewrite the statute. Bell says that Congress' deference standard can work only if the state and federal records are "substantially the same" and, preferably, "identical." He openly argues that the Court's decision in *Michael Williams* should be extended to cover any and all claims, and to equate a state court's *inability* to consider certain facts,

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[27] Bell says the Fourth Circuit held that "habeas corpus . . . *shall not* [ever] be granted" based on § 2254(e)-developed facts. (Bell's Brief at 34). However, he wisely includes no citation to the court's opinion for his imaginary "quote."

because the petitioner chose not to present them, with the *Michael Williams* finding that the petitioner did not fail to develop them. (Bell's Brief at 36-38).

This Court should be aware of the ramifications of Bell's request, and of his assertion that what he seeks is a "rare" event. Habeas petitioners, capital and non-capital alike, have *no* interest whatsoever in having a federal court apply the statutory deference standard to their claims. If this Court holds – particularly under the facts of this case involving a plain error by the federal court in holding a hearing – that whenever a federal court holds an evidentiary hearing the claim is removed from Congress' mandate for deferential review, that holding will give the green light to all sorts of gamesmanship. It will signal that all petitioners need do to avoid deference is allege a few more facts in their federal petition and seek a hearing by claiming that they were prevented from developing those facts in the state court by a summary dismissal, a filing deadline, a page limit, a denial of discovery or experts, or a host of other excuses creative petitioners will find for faulting the state court.

4. Bell was not diligent in state court and thus no hearing should have been held.

The Warden has argued consistently that no hearing was authorized.[28] The district court held a

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[28] The Warden filed a motion to dismiss, asserting that § 2254(d) required dismissal and that no evidentiary hearing

(Continued on following page)

hearing to "see if" the state court was reasonable, but that purpose was not authorized by § 2254. Nearly all of what Bell presented to the federal court was the same thing he presented to the state court. The federal court simply held a hearing on the same evidence and re-decided the same matters, albeit differently on the *Strickland* performance prong. This process was no part of § 2254(d).

The few additional witnesses Bell presented in the federal hearing were friends or family who always were available to petitioner. Bell presented them all to the federal court with no more assistance from the federal court than he had received from the state court. He received no funding from the federal court until *after it had considered his claims and granted a hearing*. And, even then, the federal court denied funding for a "mitigation specialist." Dr. Stejskal was Bell's own trial expert. Bell obtained no federal court assistance in securing Mr. Cooley, Ms. Albarus, and Dr. Cunningham. Indeed, none of his supposed new

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was permitted in this case. She filed a motion for summary judgment after the district court ordered the hearing, again asserting that § 2254(d) required dismissal. Almost her entire argument in the Fourth Circuit was devoted to the error committed by the district court. But the Warden was the *prevailing party* below. The Fourth Circuit elected not to address the district court's error based on the obvious lack of prejudice. The Warden did not have to complain in her brief in opposition about the district court's error because Bell did not make in his certiorari petition the same argument he presents now. The Warden always has contested the district court's decision to hold a hearing and the record flatly refutes Bell's contrary assertion.

evidence was alleged or presented with any assistance he did not already have when he was in state court. Every part of Bell's federal claim existed legally and factually in exactly the same form and exactly as was available to Bell in state court. Bell not only was not diligent in state court under § 2254(e)(2), *see Holland*, 542 U.S. at 653, but his "new" evidence would not have survived even the out-dated "deliberate by-pass" standard of *Fay v. Noia*, 372 U.S. 391 (1963).

The clearest example of why the district court never should have held a hearing comes from *Strickland* itself. In *Strickland*, the trial attorney actively had prepared for the guilt phase of the capital murder trial but became despondent once he learned his client, Washington, had confessed. Washington pleaded guilty and his counsel prepared only minimally for sentencing, talking only to his client and to his client's mother and wife on the telephone, "though he did not follow up on the one unsuccessful effort to meet with them" or "otherwise seek out character witnesses." 466 U.S. at 672-73. Counsel did not request any mental health expert assistance and "did not look further for evidence concerning [Washington's] character and emotional state." *Id.* at 673. Counsel stopped his investigation due to his "hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." He put on no evidence. The trial judge found the existence of numerous aggravating

factors and *found no mitigating evidence in existence. Id.* at 675.

In his state post-conviction petition, just as in Bell's case, Washington claimed ineffective assistance at sentencing: his trial counsel did not investigate, obtain a psychiatric evaluation, find and present character witnesses, *etc.* He presented affidavits from fourteen friends and family who said they would have testified for him if asked and two mental health evaluations from experts. Just as in Bell's case, the state court denied the claims without an evidentiary hearing, specifically finding that counsel's conduct was neither deficient nor prejudicial and that the affidavits "showed nothing more than that certain persons would have testified that [Washington] was basically a good person. . . ." 466 U.S. at 675-76.

Just as in Bell's case, the federal district court held a hearing on Washington's claims, after which that court found, just as in Bell's case, that trial counsel should have investigated further but that that failure did not prejudice the defense. 466 U.S. at 678-79. The Eleventh Circuit reversed, but this Court found that counsel reasonably restricted evidence about Washington's character so that harmful character and psychological evidence and criminal history would not come in. It found that, given the "overwhelming aggravating factors," there was no reasonable probability that the omitted evidence would have changed the death sentence. 466 U.S. at 699-700. This Court resolved the issue "without regard to the evidence presented at the District Court

hearing" and found that the "state courts properly concluded that the ineffectiveness claim was meritless *without holding an evidentiary hearing*." 466 U.S. at 700 (emphasis added). *See also Schriro v. Landrigan*, 127 S.Ct. 1933, 1940-42 (2007) (dismissal without federal hearing appropriate where no *Strickland* prejudice).

While not dispositive of the § 2254 issue in Bell's case, *Strickland* shows beyond any doubt that the Virginia Supreme Court's decision was reasonable and that the district court never should have gone further.[29] To the extent the Fourth Circuit erred, it was in even considering Bell's hearing evidence instead of holding that the district court should not have held a hearing and should have dismissed under § 2254(d). Bell, however, cannot complain that the Fourth Circuit actually considered his evidence and

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[29] *Strickland* also demonstrates that the state court's decision on the performance prong was not unreasonable. Counsel interviewed their client, his family, friends and an ex-girlfriend, and obtained a mitigation expert who performed his own thorough investigation. They knew about Bell's background and formulated a reasonable sentencing strategy to minimize disclosure of more prejudicial information showing Bell abandoned his wife, engaged in adulterous affairs, fathered illegitimate children for whom he provided no financial support, and beat his girlfriends. *See Cagle v. Branker*, 520 F.3d 320, 327-28 (4th Cir. 2008) (claiming ineffectiveness for presenting cross-purpose evidence); *Truesdale v. Moore*, 142 F.3d 749, 754-55 (4th Cir.) (claiming ineffectiveness for not presenting cross-purpose evidence), *cert. denied*, 525 U.S. 951 (1998). They reasonably avoided taking inconsistent positions. *See Florida v. Nixon*, 543 U.S. 175, 192 (2004).

determined his claim before agreeing that the state court's decision was not unreasonable.

5. Under any standard, Bell demonstrated no prejudice.

Bell gunned down a police officer, a "fallen hero", (JA 646), in a small town plagued by drug dealers. He had no justification except his own selfish desire not to get caught with a gun and illegal drugs, utter disregard for the sanctity of human life, and disdain for police officers. He beat his girlfriends, dealt drugs, and threatened law enforcement. He carried a gun and used it to intimidate. He bragged about killing Officer Timbrook. Just as in *Landrigan*, 127 S.Ct. at 1943-44, no weak mitigation evidence about Bell's background growing up in Jamaica years before he came to the United States and took up his life of crime, or about his affection for children he fathered but did not support, would have made a difference.

All eleven judges found the weakness of Bell's cross-purpose evidence. The Virginia Supreme Court unanimously found it *de novo*. (JA 229-30). The district court found it *de novo*. (JA 803). The Fourth Circuit found "that counsel's performance did not prejudice Bell" and then engaged in a discussion of the evidence showing why there was no prejudice. (CApp. 11a, 14a-17a).

Bell's case is a particularly poor vehicle for the rule Bell presses. No matter what the standard is, Bell cannot meet it. There simply is no probability, let

alone a reasonable one, that any jury hearing all the evidence, both that presented at trial and that Bell presented to the federal court, would not have sentenced Bell to death.

6. Bell's last argument should not be considered.

Bell argues that *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), required the state habeas court to decide his ineffective assistance claim in an evidentiary hearing. Bell did not present this argument below or in his question presented upon which certiorari was granted. It therefore should not be considered now. *See* U.S. Sup. Ct. Rule 14(1)(a); *Yee*, 503 U.S. at 535-38.

Panetti governs the specific issue of a claim of incompetence to be executed which this Court has treated differently from all other collateral claims, and which is not implicated in Bell's case. Moreover, nothing about the Virginia Supreme Court's habeas decision-making in Bell's case was unfair. Bell was given two court-appointed, capital-qualified, habeas attorneys and a statutory period of not less than 120 days to file a petition. He had his own investigator who also was a lawyer. The Virginia Supreme Court considered all the evidence Bell presented and assumed it all true. Its decision applying this Court's governing precedents to the claims and evidence presented was not rendered unfair simply because

the state court decided the issue on a motion to dismiss.

Coleman, 501 U.S. at 755-57, made clear that the federal courts may not assess the constitutionality of habeas counsel's effectiveness because the Constitution does not require a state court even to provide habeas corpus review. If this Court were to constitutionalize collateral proceedings, then there literally could be no finality to state court criminal judgments. *See Evitts v. Lucey*, 469 U.S. 387, 411 (1985) (Rehnquist, J., dissenting) ("Now lawfully convicted criminals who have no meritorious bases for attacking the conduct of their trials will be able to tie up the courts with habeas petitions alleging defective performance by appellate counsel. The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity."). This Court never has found that the Constitution extends to such matters as Bell proposes.

In *Michael Williams*, 529 U.S. at 442-43, the Court held that "[w]e do not suggest the State has an obligation to pay for investigation of as yet undeveloped [habeas] claims." The Court certainly never has suggested that a state court must employ a specific procedure, or hold a hearing, on a claim of ineffective assistance of counsel, and nothing in the Constitution would require such intrusion into a State's collateral review processes. The Court should not consider the sea change Bell seeks.

CONCLUSION

The Court should affirm the judgment of the Fourth Circuit.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

EDWARD NATHANIEL BELL,

PETITIONER,

v.

LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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7 Am. Jur. 2d *Attorneys at Law* § 225 (2d ed. 2008) 16

American Bar Association: Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) 27

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Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in the U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.....11

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ARGUMENT

I. THE NEW FACTS BELL ESTABLISHED ON FEDERAL HABEAS TOOK HIS CLAIM OUT OF § 2254(d)

The issue before this Court is now cast in sharp relief. Both parties agree the Fourth Circuit erred in taking the more fulsome record developed on federal habeas into account when assessing whether the state court's decision was "unreasonable" under 28 U.S.C. § 2254(d)(1)-(2). Bell contends that, where the state court record is inadequate through no fault of a petitioner, the federal court may receive additional evidence and make its own decision about the merits of the petitioner's constitutional claims. Respondent insists that, so long as the state court's decision is reasonable based on the state court's record, however inadequate, the federal court must close its eyes to new evidence establishing that the prisoner is in custody in violation of the federal constitution. Resp. Br. 62. Respondent derives that conclusion from the following premises:

- Respondent agrees with Bell that unreasonability under § 2254(d) must be demonstrated solely on the state court record. Resp. Br. 56; *see also Holland v. Jackson*, 542 U.S. 649, 652 (2004).
- Respondent insists that a federal court cannot hold an evidentiary hearing under § 2254(e) unless § 2254(d) unreasonability has been proven first. *See* Resp. Br. 46-48.
- Respondent contends that the inadequacy of a state court's fact finding process does

not establish unreasonability. Resp. Br. 64-65.

Under Respondent's view, therefore, whenever a state court has articulated an internally consistent rationale, the federal habeas court may not receive evidence (let alone grant relief) regardless of how deficient the state court's fact finding process was. As this Court recognized in *Michael Williams v. Taylor*, 529 U.S. 420 (2000), Congress did not intend such blatant unfairness.

A. Bell Preserved This Issue

Respondent's waiver protest, Resp Br. 31-35, is specious. In both courts below, Bell argued that the mitigating evidence he uncovered on federal habeas rendered the strictures of § 2254(d) inapplicable, citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003). *See* JA-795; Brief of Petitioner-Appellant at 38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007); Reply Brief of Petitioner-Appellant at 23 & n.9, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007). That put both courts on ample notice of Bell's argument, as *Monroe* held there can be no "[Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA")] deference" on *Brady* materiality (a test indistinguishable from *Strickland* prejudice) where new evidence has been "presented for the first time in federal court." 323 F.3d at 298-99. While Bell did not explain why *Monroe* was correct, he hardly was obliged to expand on the reasoning of binding circuit precedent or to argue the merits in a petition for certiorari.

Respondent also makes a half-hearted estoppel argument, invoking Bell's 2005 assertion that his

federal claim was the same as his state claim. Resp. Br. 34. She fails to mention that in her own brief she told the district court that "[e]ven a cursory comparison between Bell's state habeas petition on [the ineffective assistance of counsel] issue and his § 2254 petition ... demonstrates that Bell argued a different claim in the Virginia Supreme Court." Mem. Accompanying Answer and Mot. to Dismiss at 42, *Bell v. True*, No. 7:04CV752 (W.D. Va. filed June 16, 2005). Moreover, Respondent previously agreed with Bell's view that different *facts* give rise to different *claims*. Focusing on Bell's argument that his trial counsel's closing was prejudicial, she told the district court "Bell never raised *that* claim in the Virginia Supreme Court. Bell's claim is foreclosed from review now." *Id.* at 48 (emphasis added) (citations omitted). Both briefs were written before the district court provided Bell the resources he was denied in state court. Bell cannot be faulted for not flagging the significance of new evidence *before* it came to light, but having taken the position that Bell's mere *petition* raised "a different claim," Respondent cannot reverse course now that more evidence has come to light.

B. Significant New Facts Can Give Rise To A New Claim

1. Respondent's Manner Of Reconciling § 2254(d) And (e) Is Misguided

Abandoning the Fourth Circuit's reasoning, Respondent recognizes that evidence newly developed in federal court cannot play a role in the assessment of reasonability under § 2254(d). Resp.

Br. 56. In her view, when a state court makes its decision on an inadequate record, and the inadequacy of the record is not the petitioner's fault (*i.e.*, the petitioner has been found diligent under *Michael Williams*), the federal court may not grant relief unless the state court decision is unreasonable on its face. Resp. Br. 47 ("Only if the applicant shows that the state court decision unreasonably decided the facts presented may a federal court determine the claim *de novo*."). Respondent would have district courts deny hearings in all such circumstances as futile, even if the applicant would otherwise qualify for a hearing under § 2254(e). Resp. Br. 46-49 (describing § 2254(d)-based barriers to a hearing before a court even considers (e)); Criminal Justice Legal Foundation ("CJLF") Br. 24. That reading is harsher than this Court ever has condoned, on par with the "no-fault" theory of § 2254(e) that the same Respondent unsuccessfully urged in *Michael Williams*.

An application of Respondent's theory to three hypotheticals illustrates its flaws. Assume first a prisoner who raised a *Brady* claim on state habeas, but did not then know the full extent of her prosecutor's misconduct because she was denied discovery and a hearing—the facts, for example, of *Monroe*, 323 F.3d at 293-96. Assume the state court addressed and rejected her *Brady* claim. In Respondent's view, that ruling, so long as it was not facially unreasonable, would preclude an evidentiary hearing in federal court. Resp. Br. 47-48 (requiring dismissal without a hearing if state court judgment not unreasonable); Resp. Br. 56 (new facts irrelevant to reasonability analysis).

If Respondent's view of the interaction of (d) and

(e) were correct, such a *Brady* claim would be dismissed with no court ever receiving evidence detailing the depth and breadth of the prosecutor's misconduct. Yet in *Michael Williams*, this Court unanimously held that Congress did not intend "to bar evidentiary hearings for diligent petitioners with meritorious claims just because the prosecution's conduct went undetected in state court." 529 U.S. at 434-35.

Respondent imagines a special *Brady*-only exception to her interpretation. Resp. Br. 55-56. The statutory language provides no such carve-out: § 2254(d) speaks of "claims," not "claims other than *Brady*." And, merely carving out *Brady* claims would not cure the fundamental problem. Consider a hypothetical tracking the facts of *Michael Williams*, with one modification. In the Supreme Court of Virginia, Williams alleged "'improprieties'" in the empanelling "of the jury,'" but he did so in a motion for investigative resources rather than in his petition. 529 U.S. at 442 (citation omitted). Assume instead a petitioner who presents the same undeveloped claim in his state petition, is diligent just as Williams was, but is likewise denied resources and a hearing in state court and loses the claim. Under Respondent's view, that petitioner would be denied relief under § 2254(d)—the state court's substantive decision would not be unreasonable, *id.* at 442-43 (state court's denial of resources "understandable in light of petitioner's vague allegations")—and would have no right to further factual development or a federal hearing because nothing discovered in federal court would be relevant to that intrinsic § 2254(d) analysis. Resp. Br. 56. That result cannot be squared with this

Court's precedent—Williams did not prevail just because he *left his jury claim out* of his state petition.[1]

Finally, assume a petitioner who raises a claim of improper denial of compulsory process in violation of the Sixth Amendment. Assume the petitioner loses his claim in state court but in federal court satisfies § 2254(e)(2)(A)(ii) and (B)—*i.e.*, he identifies evidence "that could not have been previously discovered through the exercise of due diligence" that establishes his actual innocence "by clear and convincing evidence." Under Respondent's view, that petitioner would also lose in federal court because the newly discovered facts do not give rise to a new "claim," Resp. Br. 32-33, nor can they be taken into account in assessing the reasonability of the state court's decision, Resp. Br. 56. And because § 2254(d) forbids relief in such a case, a hearing would be futile. Resp. Br. 46-49, 56-57. Surely Congress did not intend innocent and faultless petitioners to be deprived of all relief—yet they would under Respondent's interpretation.

Respondent insists her interpretation raises no structural tension because it preserves a role for § 2254(e)(2), *inter alia*, where a state court's judgment has been found intrinsically unreasonable and a federal hearing is required to assess whether relief is warranted. Yet neither Respondent nor her amici reconcile their view—that Congress intended

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[1] This hypothetical also illustrates the flaw in CJLF's crabbed interpretation of § 2254(e)(1). CJLF Br. 20-22. In this circumstance, Congress surely intended the petitioner to be able to rebut state court fact findings by clear and convincing evidence.

to constrain federal review solely to judging the intrinsic reasonableness of a decision rendered on an inadequate state court record—with *Michael Williams*.

Nor does Respondent's position find any other support in this Court's precedent. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1937 (2007), holds that "[i]n cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." While *Schriro* does require courts to take § 2254(d) into account when considering whether an applicant has pled facts that, if true, would entitle him to relief, *id.* at 1940, Bell's interpretation fulfills that requirement—if an applicant proposes to prove facts that would take a claim out of § 2254(d)'s regime, an evidentiary hearing would not be futile under *Schriro*.

The reconciliation of §§ 2254(d) and (e) advanced by Judge Kozinski in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004), is far more plausible than Respondent's. *Taylor* understands § 2254(d) as addressing "situations where petitioner challenges the state court's findings based entirely on the state record" and § 2254(e) as addressing "challenge[s] based on extrinsic evidence ... presented for the first time in federal court." *Id.* at 999-1000. Under *Taylor*, such extrinsic evidence has a role to play *even after* a state decision is upheld as reasonable under § 2254(d). *Id.* at 1000. Bell's interpretation of "claim" explains how *Taylor*'s interpretation is consistent with the text of § 2254(d).

2. Amici's Textual Analysis Is Meritless

While Respondent does not grapple with Bell's textual analysis, CJLF does. CJLF Br. 13-23. Ignoring cases that construe "claim"—the actual language of § 2254(d)—CJLF directs this Court to *Sanders v. United States*, 373 U.S. 1 (1963), a case construing the word "grounds." CJLF Br. 14-16. CJLF says those words are "interchangeabl[e]," *id.* at 14, but *Sanders* itself distinguishes them. *Sanders* explains that "a *claim* of involuntary confession predicated on alleged psychological coercion does not raise a different '*ground*' than does one predicated on alleged physical coercion." 373 U.S. at 16 (emphases added). Consistent with Bell's view, *Sanders* treats a "claim" as defined by its underlying facts in a way that a "ground" is not. Moreover, in 1996, Congress amended § 2244 to replace "ground" with "claim," the sort of change this Court ordinarily assumes has meaning. *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").[2]

Section 2254 distinguishes "ground" from "claim" in the same way. Section 2254(a) authorizes habeas relief "only on the ground that [a prisoner] is in custody in violation of" federal law, while § 2254(d) and (e) divide that larger "ground" up into "claims"

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[2] Though *stare decisis* is not a mix-and-match affair, CJLF takes it upon itself to blue-pencil *Sanders*, rejecting its rule that "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Compare* 373 U.S. at 16, *with* CJLF Br. 15.

some of which will have been adjudicated in state court and others of which may require additional factual development. When Congress uses different words, it generally intends different meanings. *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 n.9 (2004).

The question before this Court is the level of generality at which a "claim" should be defined. Respondent and her amici calibrate "claim" at a very high level of generality, suggesting that all of a petitioner's various allegations of ineffective assistance of counsel constitute a single "claim." CJLF Br. 18. That cannot be correct. In this very case, the state court recognized (and even assigned numbers to) multiple "claims" of ineffective assistance of counsel, each defined by its operative facts. *E.g.*, Pet. App. 237a, 238a-41a, 244a, 247a. And Respondent's view would wreak havoc elsewhere in the habeas statute. For example:

- The harder it is for new facts to give rise to a new claim, the harder it will be for states to secure dismissals for failure to exhaust under *Vasquez v. Hillery*, 474 U.S. 254 (1986).

- Under the opt-in procedures, 28 U.S.C. § 2264(a) prohibits consideration of "claims" not "raised and decided on the merits in State courts." Under CJLF's view, a petitioner who made any *Strickland* argument in state court has free rein to make more in federal court.

Congress's use of "adjudicated on the merits" also

suggests that a much lower level of generality is appropriate—changes in the facts of a case can dramatically change its "merits," hence Congress should be understood as expecting that a "claim" will be defined with reference to its operative facts. The Sixth Circuit so held in *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006) ("Joseph's current *Brady* claim is not the same as the one he brought before the state courts: he now relies on a different mix of suppressed evidence that includes some items discovered only during federal habeas proceedings. Thus, Joseph argues, his *Brady* claim was *not* 'adjudicated on the merits in State court proceedings,' and AEDPA's strict standard of review does not apply. We agree."), *cert. denied*, 127 S. Ct. 1827 (2007); *see also Monroe*, 323 F.3d at 297-99; *Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002), *cert. denied*, 537 U.S. 1179 (2003); *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003).

Although Respondent and her amici insist that Bell's interpretation of § 2254(d) would open the floodgates, allowing *de novo* review of every habeas case, Resp. Br. 38-39, 58; CJLF Br. 7-9, the rule Bell proposes would actually affect very few cases. As explained in Bell's opening brief (at 38), a petitioner must qualify for an evidentiary hearing under § 2254(e)(2) before he will even have an opportunity to prove new facts. Although CJLF characterizes the *Michael Williams* diligence standard as "permissive," CJLF Br. 8, and Respondent contends it can be met by "a host of ... excuses creative petitioners will find," Resp. Br. 58,[3] the empirical record proves that

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[3] While Respondent claims "it is almost always possible to find an uninterviewed witness or unread document," Resp. Br.

district courts are faithful gatekeepers that honor AEDPA's restrictions. Since passage of AEDPA, applicants in capital cases have received evidentiary hearings less than 10% of the time (and less than 1% in noncapital cases). Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in the U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* 35-36 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. Moreover, in the few cases that do receive hearings, to obtain *de novo* review a petitioner still has to prove new facts that significantly affect the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts. Pet. Br. 39-40. And even then, *de novo* review will apply only to the component of the petitioner's claim affected by the new evidence. *See* Pet. Br. 39.

C. Bell's New Evidence Was Significant Enough To Take His Claim Out Of § 2254(d)

Our law requires that a capital jury be given the opportunity to consider any "mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime." *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1664 (2007); *see also Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The reason is not to convince the jury that the

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38 (emphasis omitted), courts do not find deficient performance based on trivial omissions.

defendant is a model citizen. Defendants convicted of capital crimes never are. But the death penalty is "confin[ed]" to that small class of offenders who are "'the most deserving of execution.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650, 2659 (2008) (citation omitted). Mitigating evidence may prove that a defendant, who concededly committed a heinous crime, is not within that small class "most deserving of execution." Thus, for example, in *Terry Williams v. Taylor*, this Court found prejudice from failure to present mitigating evidence even though the defendant beat one victim to death with a mattock for three dollars, beat an elderly woman into a coma, and set his jail cell on fire. 529 U.S. 362, 368-69 (2000).

When considered on top of the record developed on state habeas, the mitigating evidence Bell newly uncovered in federal court could well have convinced a jury he was not "the most deserving of execution." Amici's own authority, *Roberts v. Louisiana*, 431 U.S. 633, 636-37 (1977), *cited at* VACA Br. 7, recognizes "the absence of any prior conviction" as an example of a mitigating circumstance even where the crime is the killing of a police officer. The absence of convictions is mitigating because it shows that the defendant's crime does not tell the whole story of that person's character. Here, Bell's mitigating evidence (including the absence of prior felony convictions) likewise would have undermined the state's claim of future dangerousness and demonstrated redeeming facets of Bell's character and relationships that might cause a jury, in justice and mercy, to spare his life.

1. Respondent Expressly Concedes That Bell Presented Significant New Evidence On Federal Habeas

Respondent concedes that proof of Bell's historically positive relationships with law enforcement was introduced newly in federal court. Resp. Br. 41. Respondent derides this evidence as "laughable" and "offensive" in light of the crime, *id.*, but the jury well may have felt otherwise. *See Rompilla v. Beard*, 545 U.S. 374, 386 n.5 (2005) (it is "reasonabl[e] to assume that the jury could give more relative weight" to evidence where trial counsel misses an opportunity to explain or rebut). The prosecutor did not think the crime alone sufficient to prove future dangerousness: instead he tried to prove that Bell hated *all* law enforcement officers and therefore would attack prison guards. JA-141. Bell's trial counsel offered no response—to the contrary, Mark Williams told the jury the evidence "was very graphic about a violent man. We didn't rebut it" or "try to defend it, refute it." JA-145. On federal habeas, Bell's new evidence identified specific police officers who knew and liked Bell, JA-514, 588-89, and witnesses who would testify that Bell did not hate law enforcement. JA-513-14, 578, 588-89, 603. A jury shown the full picture easily could have believed that Bell did not hate law enforcement officers generally (and thus would not be a danger to prison guards), especially where the prosecution's guilt/innocence theory was that Bell specifically hated Sgt. Timbrook. Pet. App. 187a-88a. The state habeas court was unaware that a key element of the prosecution's theory was rebuttable.

Respondent also concedes that Enos Davenport's statement (disputing Officer Robinson's testimony that Bell threatened him in jail) was "not ... present[ed] ... to the state court," Resp. Br. 42; *see also* Pet. App. 82a n.17 (district court finding that Bell "presented for the first time in his federal habeas petition ... a letter from Enos Davenport"). Respondent blames Bell, but the district court found Bell was diligent and Respondent does not demonstrate that Davenport's statement, a report written by a jail inmate, was available to state habeas counsel. Davenport's statement refutes testimony of future dangerousness the prosecutor thought important enough to emphasize in closing. JA-141-42. Its significance cannot be denied. *See Banks v. Dretke*, 540 U.S. 668, 700 (2004) (relying on prosecutor's penalty-phase summation in assessing materiality under *Brady*).

2. Respondent Implicitly Concedes That Other Significant Evidence Was New On Federal Habeas

Respondent claims that the beatings Bell suffered as a child were known to Dr. Stejskal and, therefore, to trial counsel. Resp. Br. 43-44. In fact, Dr. Stejskal only mentioned abuse when he quoted one of Bell's sisters denying that it happened. JA-269. But in any event, what matters here is not what *trial counsel* knew, but what the *Supreme Court of Virginia* knew when it found Bell was not prejudiced by his counsel's failures. Respondent does not even *try* to suggest that the state court was aware Bell was abused as a child, nor does Respondent claim the state court considered that fact when evaluating prejudice.

Respondent next attempts to minimize the new evidence of child abuse, claiming that no one used the word "beat." Resp. Br. 43-44. In fact, Bell's aunt and cousins all recalled Bell being "beaten," JA-505, and in any event child abuse "[is] not rendered benign" even if it is "minimize[d]" by "some siblings" due to their "cultur[al]" training. JA-326. Bell was beaten "with electrical cords, belts, wood planks, and brooms," leaving scars he still bears today. JA-323.[4] Bell often would be "awakened in the middle of the night by blows to the head," or "locked in a room" and "deprived of food." *Id.* Even if other habeas petitioners suffered more extreme abuse, the abuse Bell experienced certainly was material enough to warrant consideration by the federal court charged with weighing the *totality* of available mitigating evidence.

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[4] Respondent protests that the report of this abuse was never admitted into evidence, Resp. Br. 43-44, but it is part of the record, having been submitted to the district court as an exhibit in the summary judgment briefing. JA-v-vi. The district court instructed counsel that "all of the" materials "previously filed are part of the record in this case" and that a document "does not need to be reintroduced if it has already been introduced as an exhibit." JA-368-69. For the same reason, Respondent's claim that cards from and pictures of Bell's children were never admitted, Resp. Br. 44, fails—all were exhibits to Bell's initial petition. JA-iv. And the district court met Bell's children and found their introduction "very relevant." JA-561.

Respondent's insistence on evidentiary formalities also founders on *Wiggins v. Smith*, 539 U.S. 510 (2003), which relied on a report that may not have been admissible at all. *Compare* 539 U.S. at 554-55 (Scalia, J. dissenting) *with* 539 U.S. at 536 (evidentiary status of report irrelevant). *Wiggins* also defeats Respondent's hearsay argument at Resp. Br. 40 n.20.

Respondent effectively concedes that the Supreme Court of Virginia also did not have the benefit of the expert opinions of Mr. Cooley and Dr. Cunningham, arguing only that those opinions are "not 'new evidence' of anything." Resp. Br. 45. Respondent recycles her trial objections, claiming their testimony was merely "opinions on what defense attorneys should do in capital cases," *id.*, but the district court rightly overruled Respondent's objections. JA-370, 759. Cooley and Cunningham tendered expert evaluations of how a reasonable jury likely would have reacted to the facts uncovered on federal habeas—direct evidence of prejudice.[5] JA-404-08, JA-763-64. Had Bell sued his trial lawyers for malpractice, he would have been required to prove that his lawyers' errors caused him to lose. Courts nationwide recognize expert testimony as *highly* relevant to that analysis. *E.g.*, 7 Am. Jur. 2d *Attorneys at Law* § 225 (2d ed. 2008) ("The ... consequences of an attorney's tactical choices ... generally require expert testimony in a legal malpractice action."). Expert testimony is equally significant here.

Finally, Respondent claims that evidence of Bell's children's affection for their father introduced for the first time on federal habeas was not "new," as the cards Bell attached as exhibits to his § 2254 petition were dated "pre-trial and during-trial." Resp. Br. 44.

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[5] Indeed, this testimony was the *only* direct evidence of prejudice available to Bell. While one of Bell's jurors swore in an affidavit that she was looking for any reason whatsoever "not to sentence him to death," JA-215, Bell was precluded from introducing that evidence. He tendered instead the opinions of experts well-experienced in the way capital juries react to evidence.

But the mere fact that mitigating evidence *existed* does not mean that it was *discovered* and *presented* on state habeas. And not even Respondent denies that a loving child's plea for mercy easily could have moved one or more of Bell's jurors. Indistinguishable evidence sufficed to prove prejudice in *Harris v. Dugger*, 874 F.2d 756, 761-64 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1989), *Collier v. Turpin*, 177 F.3d 1184, 1201-04 (11th Cir. 1999), and *Marshall v. Cathel*, 428 F.3d 452, 470-74 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006). Surely it is important enough to be considered as part of the totality of mitigating evidence *Wiggins* commands courts to weigh.

3. Respondent Mischaracterizes Bell's Remaining Evidence

Respondent contends that evidence disputing Bell's general propensity for violence was not new because some of the same facts were captured in the state court affidavits of Tracy and Joanne Nicholson. Resp. Br. 40-41. In state court, with no court-appointed investigator and no hearing, Bell was able to present only basic assertions by the Nicholsons that he was "never violent." JA-188-91. But those bare points do not compare with the evidence Bell was able to present in federal court. Albarus testified that Bell has a reputation in his community in Jamaica as "non violent and non retaliatory," and that his conviction for tearing a shirt was seen as trivial by the ostensible victim. JA-513. Anderson testified that, in Jamaica, Bell never got into fights or expressed animosity towards police. JA-603. Henderson testified that, when she knew and worked with Bell in the United States, she never

saw him act violently toward anyone. JA-584. Joanne Nicholson, who lived in a home with Bell for almost three years, expanded on her affidavit and explained that she never saw Bell act violently or threaten anyone. Pet. App. 81a, 172a. The federal court saw far more evidence that Bell would not be a future danger than the state court did.[6]

Finally, Respondent ridicules the notion that hearing live testimony is materially different from reading abbreviated affidavits. Resp. Br. 42. Obviously, a district court cannot exempt itself from § 2254(d) merely by hearing live the testimony that is already available in the state court record. Pet. Br. 44-45. Equally obviously, however, the additional information a district court receives by watching live testimony cannot be irrelevant—especially here, where the ostensible flaw in Bell's mitigation case was the credibility of his witnesses and their supposed vulnerability to impeachment and cross-examination. *Compare* Pet. App. 240a (state court questioning credibility of Nicholsons' affidavits) *with* Pet. App. 172a (district court, after hearing, finding Nicholson "would have been a helpful mitigation witness"). On direct review, the advantage derived from seeing live testimony can be so important as to render a fact finding essentially unreviewable. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). It cannot be that the very same information is utterly immaterial on collateral review.[7]

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[6] For an item-by-item listing of new testimony given by witnesses who submitted affidavits in state court, see Petitioner's Reply on certiorari at 3-5.

[7] Although Respondent insists that the Supreme Court of

4. The Totality Of Bell's New Mitigating Evidence Was Significant

Ignoring *Williams* and *Wiggins*, Respondent claims *Strickland* proves Bell's mitigating evidence was meaningless.[8] Resp. Br. 60-63. But the sentencer in *Strickland v. Washington*, was a judge who could not give a life sentence unless he found the mitigating circumstances "outweighed" three "especially heinous, atrocious" murders "involving

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Virginia "assumed the truth of Bell's allegations," *e.g.*, Resp. Br. i, 1, 16, its opinion is replete with examples to the contrary. *See* Petition for Rehearing of Petitioner-Appellant, *Bell v. True*, No. 030539 (VA filed May 28, 2004).

[8] On *Strickland*'s back, Respondent now criticizes the district court's finding of deficient performance. Resp. Br. 60-63 & n.29. But in her Brief in Opposition Respondent did not raise that issue as an alternative ground for affirmance that should bar this Court from reaching Bell's Question Presented. In any event, the district court's deficiency ruling was sound and rested on its assessment of witnesses' credibility. JA-798. Respondent called trial counsel, and the court heard their explanation for discharging Marie Deans, relying on Dr. Stejskal, and not interviewing Barbara Williams, Carol Anderson, Dawn Jones, or Joanne Nicholson. JA-656-57, 688, 724-25, 729-33, 749. The court also heard those witnesses dispute trial counsel's claims, JA-421-28, 460-62, 477-81, 549-51, 568-71, 593-94, 603-05, and it disbelieved trial counsel. JA-799-800, 802. The district court had an insurmountable advantage, having seen the witnesses' demeanor. *Miller-El v. Cockrell*, 537 U.S. 322, 339-40 (2003). And whereas counsel in *Strickland v. Washington* had a mitigation strategy involving acceptance of responsibility and remorse, 466 U.S. 668, 673-74 (1984), counsel for Bell did not, as explained in Bell's reply on certiorari at 1-2. *See also* Pet. App. 174a; JA141-43, 150, 784, 785-87, 793-94. Bell's counsel presented "literally no mitigating evidence." JA-647; *see also* JA-648, 793.

repeated stabbings." 466 U.S. 668, 674-75, 700 (1984). Bell's jurors, by contrast, were not required to "weigh" anything, but rather were free to show "mercy" and give a life sentence if they "believe[d] ... that the death penalty is not justified" for Bell's crime (which the trial judge found, as a matter of law, was not "vile"). JA-158-59; CAJA 142-43. Moreover, the petitioner in *Strickland* presented internally contradictory evidence and weak character evidence, 466 U.S. at 699-700, not evidence contradicting the sole aggravating factor, evidence of child abuse, or evidence of loving children who would be bereaved by his loss. Respondent notes that eleven judges dismissed Bell's mitigating evidence, Resp. Br. 63, but thirteen dismissed Rompilla's, ten dismissed Williams', and nine dismissed Wiggins'.

The mitigating evidence Bell uncovered on federal habeas would have undermined the prosecutor's sole aggravating factor, Pet. Br. 42-46, shown the jury the abusive childhood that shaped Bell's development, Pet. Br. 46-48, and shown the jury that despite his handicaps, Bell still formed redeeming human relationships and that his family loves him and would grieve his loss. Pet. Br. 48-50. When this evidence is considered collectively with the evidence Bell was able to adduce on state habeas, at least one of Bell's jurors likely would have had a reasonable doubt about future dangerousness, found his culpability diminished by abuse, or elected to show mercy out of compassion for the diverse frailties of humankind or out of consideration for Bell's children. *See Wiggins*, 539 U.S. at 537 (prejudice shown by "reasonable probability that at least one juror would have struck a different

balance").

Expert testimony Bell presented in federal court confirms that point. Pet. Br. 50-51. Obliged to "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534, the Supreme Court of Virginia could not because it never saw the "totality" available to the federal court. There was thus nothing to which the federal court could plausibly defer. *See Monroe*, 323 F.3d at 297-99; *Joseph*, 469 F.3d at 469; *Killian*, 282 F.3d at 1207-08; *Cargle*, 317 F.3d at 1212.

D. Bell Is Not Procedurally Defaulted

Though Respondent contends that any new "claim" Bell presented in federal court must be procedurally defaulted, Resp. Br. 57, she long since waived that argument, having failed to assert it in district court, before the court of appeals, or in her Brief in Opposition. The contention, moreover, is meritless. In *Michael Williams* this Court unanimously established that a petitioner who was diligent in state court, and thus permitted to develop new facts in federal court, has "establish[ed] cause for any procedural default [he] may have committed in not presenting these claims to the Virginia courts in the first instance." 529 U.S. at 444. That was no casual turn of phrase—the issue briefed was whether the denial of discovery, assistance, and a hearing in state court constituted "cause." *See* Respondent's Brief, *Michael Williams v. Taylor*, 2000 WL 126196, No. 99-6615, at *34-35 (Jan. 31, 2000). This Court unanimously answered "yes," holding that where a prisoner is "diligent" within the meaning of *Michael Williams*, the "state courts" are given "their rightful *opportunity* to adjudicate

federal rights." 529 U.S. at 437 (emphasis added).

Here, the district court expressly found that Bell was "diligent[]" and that the state court process was ineffective to protect Bell's rights on this claim—holding that "'the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing.'" Pet. App. 84a (citation omitted). When the state court refused assistance and refused a hearing, *it* impeded the development of Bell's claim—which establishes cause for any procedural default Bell committed. 529 U.S. at 444. And prejudice is established by the merits of Bell's underlying claim. No more is necessary.[9]

II. RESPONDENT'S UNTIMELY DILIGENCE ARGUMENT CANNOT BAR RELIEF

In an effort to distract this Court from the statutory question upon which it granted certiorari, the appropriate treatment of Bell's new evidence under § 2254(d), Respondent and her amici dispute whether Bell was sufficiently diligent in state court to warrant the admission of that evidence under § 2254(e). *See, e.g.*, Resp. Br. 28-29, 31-33, 36-39, 42-45, 47, 49-51, 54-62, 64, 65; VACA Br. 27-33; Idaho Br. 12-14; CJLF Br. 7-9, 23-27. That argument is long since waived, is defeated by the district court's diligence finding, and in any event is irrelevant to this case.

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[9] That conclusion is confirmed by § 2254(b)'s exhaustion rule. Section (b)(1)(B)(ii) excuses exhaustion if "circumstances exist that render [State corrective] process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

A. Respondent Waived Any Challenge To Bell's Diligence

The Question Presented clearly framed the issue as the treatment of new evidence "that was properly received for the first time in a federal evidentiary hearing." Pet. i. In her Brief in Opposition, Respondent did not dispute that Bell's evidence was properly received under *Michael Williams*. She cannot do so for the first time now. S. Ct. R. 15.2.

But Respondent waived this argument even before omitting it from her Opposition. In the district court, when Bell argued diligence under § 2254(e)(2) in his response to the motion to dismiss, Brief of Petitioner in Opposition to Motion to Dismiss at 118-20, *Bell v. True*, No. 07:04CV752, (W.D. Va. filed Aug. 1, 2005), Respondent did not disagree. *See* Reply Brief of Respondent at 10-11, *Bell v. True*, No. 07:04CV752 (W.D. Va. filed Aug. 22, 2005). The district court found Bell diligent, and ordered a hearing. Respondent did not seek interlocutory appeal or a writ of mandamus, as she did in *Michael Williams*, 529 U.S. at 427-28. And Respondent never challenged Bell's diligence before the court of appeals. This issue, thus, has long been waived. *See Danforth v. Minnesota*, 128 S. Ct. 1029, 1046 (2008) (states waive defenses they fail to raise timely on federal habeas).

Respondent's claim that she "has argued consistently that no hearing was authorized," Resp. Br. 58, is misleading. In the court of appeals, Respondent argued that the district court abused its discretion by granting an evidentiary hearing because nothing Bell proposed to prove could establish unreasonability under § 2254(d).

Respondent-Appellee Brief at 30-31, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 13, 2007). But that argument only matters if Respondent prevails on the Question Presented; it is not an independent reason to decide the Question her way. Besides, an argument that the district court should have exercised its discretion to deny a hearing hardly preserves the argument that § 2254(e)(2) did not leave the district court any discretion to exercise. In considering Respondent's waiver, moreover, it is irrelevant that Respondent prevailed in district court. Resp. Br. 58-59 n.28. Having engaged on the propriety of an evidentiary hearing before the court of appeals, Respondent was not free to save her diligence argument for a rainy day.

B. Bell Diligently Developed The Factual Basis Of His Claims In State Court

Regardless, Respondent's diligence argument fails on the merits. The district court found that Bell was diligent in developing his facts in state court, Pet. App. at 84a, and that finding may be reviewed only for clear error. *See, e.g., Drew v. Dep't of Corrections*, 297 F.3d 1278, 1287 n.2 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237 (2003), *overruled in part on other grounds by Sykosky v. Crosby*, 187 Fed. Appx. 953 (11th Cir. 2006). When reviewing for clear error, this Court "will not reverse a lower court's finding of fact simply because [it] 'would have decided the case differently.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citations omitted).

Respondent argues that Bell could not have been diligent because "[e]very part of Bell's federal claim existed legally and factually in exactly the same form and exactly as was available to Bell in state

court." Resp. Br. 59-60. But that is not the right standard. In *Michael Williams*, the same Respondent similarly argued that the facts later adduced in federal court were available to state habeas counsel. Respondent's Brief, *Michael Williams v. Taylor*, 2000 WL 126196, at *25-26. This Court found that irrelevant, 529 U.S. at 443, explaining that "[t]he question is not whether the facts *could have* been discovered, but instead whether the prisoner was diligent in his efforts." *Id.* at 435.

Bell's efforts to pursue his claim on state habeas closely track those found sufficient in *Michael Williams*. This Court held that, to be diligent, a petitioner at a minimum must "seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. Bell did that, as Respondent readily concedes. Resp. Br. 15-16; *see also* Corrected Petition for a Writ of Habeas Corpus at 3, 47, *Bell v. True*, No. 030539 (Va. filed Apr. 21, 2003).[10] Thirty-one states apparently agree that Bell's request for a hearing is probative of diligence. *See* Idaho Br. 12.

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[10] Respondent characterizes Bell's request for an evidentiary hearing as a "routine prayer," Resp. Br. 15-16, but the Supreme Court of Virginia *never* has held such a request inadequate. And though not so required, Bell connected his requests for aid and a hearing with his ineffective assistance allegations in his Motion for Leave to File Amended and Supplemental Petition for Writ of Habeas Corpus at 4-5, *Bell v. True*, No. 030539 (Va. filed Feb. 20, 2003) ("Motion for Leave"), his Motion for Leave to Supplement Petition for Writ of Habeas Corpus On or Before June 23, 2003 at 1, *Bell v. True*, No. 030539 (Va. filed Apr. 21, 2003), his Motion for Expert Assistance at 1, *Bell v. True*, No. 030539 (Va. filed June 25, 2003), and his Motion for Discovery at 8-9, *Bell v. True*, No. 030539 (Va. filed Jan. 20, 2004).

Petitioner in *Michael Williams* also sought an investigator and expert assistance. 529 U.S. at 442. So did Bell. Corrected Petition at 47. Respondent opposed each of Bell's requests, directly and proximately hindering Bell's factual development in state court. She hardly can be heard to complain now about a problem she helped create.

Denied an investigator or any expert resources, Bell undertook such investigation as he reasonably could under the circumstances. Bell was given only 120 days to assemble and review the voluminous record, investigate all relevant facts, and prepare and file his petition, which raised numerous claims. *Compare* 28 U.S.C. § 2244(d)(1)(D) (allowing one year from the time factual predicate could have been discovered). While state law requires that qualified habeas counsel be appointed, VACA Br. 22, Bell was given lawyers with no capital habeas experience and with active trials compromising their ability to work on Bell's case. *See* Motion for Leave at 2. Appointed on November 15, 2002, Bell's lawyers found themselves working over the holiday season, when trial counsel and witnesses were on vacation, and when courthouses and record repositories were often closed. The record they finally extracted from the trial court and Bell's trial counsel stood as much as twelve feet high and was missing key pages. *See* Motion for Leave at 4. On that basis, counsel sought an extension of time, which was denied. *See* Motion for Leave at 4-7; Order Denying Motion for Leave to File Amended and Supplemental Petition for Writ of Habeas Corpus at 1, *Bell v. True*, No. 030539 (Va. filed Feb. 28, 2003). *Michael Williams* requires "a *reasonable attempt* ... to investigate and pursue claims in state court," not perfection. 529 U.S. at 435

(emphasis added). Under the circumstances, Bell's efforts were more than reasonable.

Respondent's protest that the relevant evidence was always "within Bell's own knowledge," Resp. Br. 32, reflects a willful failure to acknowledge Bell's limited capacity and the realities of capital defense. The petitioners in *Terry Williams*, *Wiggins*, and *Rompilla* also all presumably knew that they were abused as children, yet this Court faulted the trial lawyers in all three cases for not conducting *their own* investigation. *See Terry Williams*, 529 U.S. at 395-96; *Wiggins*, 539 U.S. at 534-35; *Rompilla*, 545 U.S. at 381-82, 389-93. And with good reason. The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, to which this Court repeatedly has turned, *see, e.g.*, *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 524, recognize that a defendant cannot be expected even to understand what mitigating evidence *is*, let alone to plumb his own life history, identify relevant mitigation, and serve it up to counsel (either trial or state habeas) on a silver platter. *American Bar Association: Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 952, 958, 1015 (2003) ("obligation" to investigate mitigating evidence rests with "counsel at every stage," including state habeas). Such an expectation would be particularly absurd when applied to Bell—a foreign national with virtually no understanding of the American legal system and an IQ at best somewhere "between the upper 70's" and "mid 80's." JA-428.

C. A Finding That The District Court Erred In Holding A Hearing Would Not Justify Disregarding Evidence Now Before The Federal Courts

Respondent assumes that if she demonstrates the district court erred in holding a hearing, the federal courts now must close their eyes to the evidence adduced. Suppression of evidence is always a last resort, as it compromises truth-seeking. If Respondent believed the district court erred in determining to hold a hearing, she had ample opportunity to seek reconsideration, raise the issue in her summary judgment motion, or seek an interlocutory appeal or writ of mandamus. *Compare Michael Williams*, 529 U.S. at 427-28. Respondent did none of those things. Instead, she allowed the court and the parties to invest time and effort in the conduct of an evidentiary hearing only later to ask courts to ignore the evidence presented. This Court should decline that invitation.

III. IN THE ALTERNATIVE, THE COURT OF APPEALS ERRED IN NOT FINDING THAT THE STATE COURT'S PROCEDURES UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW

Respondent asserts that Bell's *Panetti* argument is new. Resp. Br. 64-65. But the Question Presented asks whether the Fourth Circuit erred "when ... it applied" § 2254(d) to evaluate a claim based on evidence newly adduced on federal habeas, where the state court's prior "fact-finding procedures were inadequate to afford a full and fair hearing." Pet. at

i. Bell's *Panetti* argument provides a valid reason for answering that question in the affirmative because the Fourth Circuit erred not only in applying § 2254(d) at all, but also in how it applied that provision.[11] Under Rule 14.1(a), this Court is free to consider Bell's *Panetti* argument should it so choose.

Respondent also denies that clearly established federal law ever requires a hearing on state habeas, Resp. Br. 64-65, but *McNeal v. Culver*, 365 U.S. 109, 110, 117 (1961), *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 120-23 (1956), *Carter v. Texas*, 177 U.S. 442, 448-49 (1900), and *Coleman v. Alabama*, 377 U.S. 129, 133 (1964), are all to the contrary.

CONCLUSION

The judgment of the Fourth Circuit should be reversed, and the case remanded with instructions to grant habeas relief.

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[11] Bell cannot be faulted for failing to make this alternative argument to the Fourth Circuit, as he had no reason to believe that court would ignore *Monroe*, its own binding precedent.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 07-1223

IN THE

Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

vs.

LORETTA K. KELLY, Warden,
Sussex I State Prison,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

In a case where the state habeas court has rejected on the merits the petitioner's claim of ineffective assistance of counsel, while assuming in his favor any genuinely disputed material questions of fact:

1) May the District Court order an evidentiary hearing without finding that one of the exceptions to 28 U. S. C. § 2254(d) applies?

2) Does the claim become a new "claim," exempt from the restriction of § 2254(d), simply by the introduction of significant new evidence in support of the claim?

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IN THE

Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

vs.

LORETTA K. KELLY, Warden,
Sussex I State Prison,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to represent the interests of victims of crime and the law-abiding public in the criminal justice system. In this case, Petitioner asks this Court to effectively repeal the cornerstone reform of landmark legislation enacted to safeguard victims' rights to a reasonably timely disposition of capital cases. This request is contrary to the interests CJLF was formed to protect.

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

SUMMARY OF FACTS AND CASE

On October 29, 1999, petitioner Edward Bell murdered Winchester, Virginia, Police Sergeant Timbrook by shooting him in the face as Timbrook was attempting to arrest him. *Bell* v. *Commonwealth*, 264 Va. 172, 178-182, 563 S. E. 2d 695, 701-703 (2002).

A jury convicted Bell of capital murder and recommended a sentence of death. The Supreme Court of Virginia affirmed. *Id.*, at 178, 209, 563 S. E. 2d, at 700, 719. The state court promptly appointed two attorneys, and the defense team also had an investigator. See Brief for Respondent 11-12. The attorneys filed a habeas petition with 14 claims, including ineffective assistance of counsel. See App. to Pet. for Cert. 29a-30a. "In a lengthy opinion, the Supreme Court of Virginia . . . granted the state's motion to dismiss Bell's habeas petition." *Id.*, at 30a; *id.*, at 231a-261a.

Although Petitioner's question presented in this Court refers to "evidence of prejudice the state court refused to consider," Brief for Petitioner i, his description of the state habeas proceedings in his Statement of the Case does not indicate any evidence the state court refused to consider. See *id.*, at 11-12. The opinion indicates that the state court accepted all the proffered evidence at face value and determined on the basis of that evidence and the trial record that the criteria for relief based on ineffective assistance of counsel had not been met. App. to Pet. for Cert. 237a-240a.

On federal habeas, Bell made twelve claims. *Id.*, at 31a-32a. The District Court dismissed eleven of them without an evidentiary hearing. *Id.*, at 167a. However, the District Court ordered an evidentiary hearing on the ineffective assistance claim without finding that Bell had qualified for an exception to 28 U. S. C.

§ 2254(d) but only finding a colorable claim that he did. *Id.*, at 83a-84a.

After the hearing, the District Court issued an oral ruling finding that Bell had met the performance prong but not the prejudice prong of the *Strickland* standard. Neither the Virginia Supreme Court decision nor the § 2254(d) standard is mentioned in the opinion. The Fourth Circuit affirmed, reading the District Court's order as applying the § 2254(d) standard despite the lack of any mention of it, *id.*, at 12a, n. 2, and agreeing that the Virginia Supreme Court decision was a reasonable application of controlling precedent. *Id.*, at 16a-17a.

SUMMARY OF ARGUMENT

Achieving an effective death penalty was the central purpose of the habeas reform chapter of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Act must be construed with constant attention to that purpose. Petitioner's proposal that he can escape the restriction of the cornerstone reform of this act merely by alleged "significant" additional facts for his ineffective assistance claim—a claim made in virtually every capital case—would amount to a judicial repeal of this provision in the circumstances Congress was primarily concerned with. Given the unlimited nature of mitigation under *Lockett*, there is no limit to what habeas counsel can come up with.

Subsection 2254(d) is a modified rule of res judicata, like § 2244(b). The word "claim" has the same meaning in both sections and the same meaning as "ground" in the prior law. That meaning refers to a particular legal right claimed to have been violated. Alleging new facts to support the claim does not make a new claim, a

principle well understood before AEDPA and not changed by it.

Whether § 2254(d) does or does not preclude relief on a claim must be determined entirely from the state court record. If it does, ordering an evidentiary hearing is an abuse of discretion. Ordering the hearing was an abuse of discretion in this case.

Subsection 2254(d) is a limit on the district court's authority to grant relief on the merits, not deny relief on the merits. As with unexhausted claims, a meritless claim may simply be denied as such, and it should be when the lack of merit is obvious, other grounds for denial involve difficult problems, and denial on the merits is the most efficient route. In this case, deciding the merits *de novo* was not the preferred path, but the District Court did, and the decision was correct.

ARGUMENT

I. Petitioner's proposed interpretation would amount to a judicial repeal of the cornerstone reform of the Antiterrorism and *Effective Death Penalty* Act for the very cases Congress was primarily concerned with.

Petitioner proposes that the lower federal courts be authorized to bypass the standard of 28 U. S. C. § 2254(d) and decide an ineffective assistance claim *de novo* whenever (1) the federal court receives additional evidence of mitigation that trial counsel might have introduced and (2) this additional evidence is "significant" enough that it might have tipped the balance in the determination of prejudice. Brief for Petitioner 25. This, to use petitioner's words, "cannot be the law." Cf. Brief for Petitioner 21. The proposal would make *de novo* review the norm and not the exception in the

capital cases that Congress was primarily concerned with when it enacted § 2254(d). It would vest a nearly unlimited power to escape the restraint imposed by Congress in the very courts that Congress decided had abused their authority and needed to be restrained: the lower federal courts.

A. The Purpose of AEDPA's Habeas Reform.

The central purpose of Congress's reform of habeas corpus in 1996 is right in the title of the act: The Antiterrorism and *Effective Death Penalty* Act of 1996, 110 Stat. 1214, § 1 (1996) (AEDPA) (emphasis added). The death penalty was ineffective, and in most states still is, because capital cases were subjected to too many reviews. At several points in the debate, supporters of the reform cited appalling large numbers of reviews of a single case, typically involving no substantial question of actual innocence. See, *e.g.*, 141 Cong. Rec. 15,018-15,020 (1995) (statement of Sen. Specter); 142 Cong. Rec. 7574-7575 (1996) (statement of Sen. Gorton).

In enacting AEDPA, " 'Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law' . . . . It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Terry Williams* v. *Taylor*, 529 U. S. 362, 404 (2000). The statute must be construed with reference to this purpose of curbing delays and preventing retrials, particularly for capital cases. An interpretation which would make relitigation the norm rather than the exception is not correct.

Limiting reconsideration of cases and particularly of claims that had already been considered is a theme that runs throughout the act. See Parts II and III, *infra*.

Another theme is renewed respect for state courts. The old assumption that a federal court's resolution of a case was necessarily superior to the state court's resolution of the case was abandoned. "State courts, in many respects, are just as good, if not better, than the Federal courts—in these areas, just as good." 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch); see also *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). Along with renewed confidence in state courts, there is a strong element of frustration with the lower federal courts and a sense that they had not been properly exercising the authority they had been granted. The debacle of the Ninth Circuit's handling of the Robert Alton Harris case, see *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992); *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-768) was cited repeatedly by the supporters. 141 Cong. Rec. 4111-4112 (1995) (statement of Mr. Cox); *id.*, at 14,734, col. 1 (statement of Sen. Feinstein); see *id.*, 15,019 (1995) (statement of Sen. Specter).

Following enactment of AEDPA, many federal courts chafed at the restriction of § 2254(d), and many times this Court has found failures to obey that statute to be so patently erroneous as to warrant summary reversal. See *Early* v. *Packer*, 537 U. S. 3, 4 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U. S. 19, 20 (2002) (*per curiam*); *Yarborough* v. *Gentry*, 540 U. S. 1, 2 (2003) (*per curiam*); *Mitchell* v. *Esparza*, 540 U. S. 12, 13 (2003) (*per curiam*); *Middleton* v. *McNeil*, 541 U. S. 433, 434 (2004) (*per curiam*); *Bell* v. *Cone*, 543 U. S. 447 (2005) (*per curiam*); *Kane* v. *Garcia Espitia*, 546 U. S. 9 (2005) (*per curiam*); *Bradshaw* v. *Richey*, 546 U. S. 74 (2005) (*per curiam*); *Wright* v. *Van Patten*, 552 U. S. __, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (*per curiam*). An elastic escape clause from § 2254(d) would legalize the evasion of Congress's intent that this Court has so often needed to enforce.

B. Routine, Not Rare.

Petitioner's proposal has only two elements needed for the federal court to escape the harness of § 2254(d). First, new evidence must be properly introduced in federal habeas. Second, the new evidence must "affect[] the court's application of the relevant constitutional rule or its impression of the relevant facts . . . ." Brief for Petitioner 22. Petitioner assures this Court that such cases would be "rare." *Ibid.* Far from it. In some circuits, at least, *every* capital case would come under this rule. One might as well propose a judicial repeal of § 2254(d).

Petitioner's proposed requirement that a release from § 2254(d) be limited to cases where the new evidence has been "properly" received has two significant problems. First, the decision to hold an evidentiary hearing remains discretionary, and this Court has not yet mapped out the lower end of the bounds of discretion. This point is addressed further in Part IV, *infra*.

Second, there is a circularity problem here. Subsection 2254(d) is important in determining what is properly received.

> "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. See, *e.g.*, *Mayes* v. *Gibson*, 210 F. 3d 1284, 1287 (CA10 2000). Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Schriro* v. *Landrigan*, 550 U. S. __, 127 S. Ct. 1933, 1940, 167 L. Ed. 2d 836, 844 (2007).

If "significant" new evidence is enough to escape the § 2254(d) bar, then a hearing would be proper, perhaps even required, in *every* case where a defendant makes a mere allegation of facts that, if true, would entitle him to relief in the District Court's *de novo* judgment, so long as a "significant" portion was not presented to the state court and is not barred by the permissive standard of *Michael Williams* v. *Taylor*, 529 U. S. 420 (2000). For the penalty phase of capital cases, the central concern of Congress when it enacted AEDPA, that would be nearly every case.

A large part of the problem, once again, is *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion), and its progeny. By throwing open the doors of mitigating evidence to everything including the kitchen sink, *Lockett* created an inexhaustible supply of potential mitigation evidence that habeas counsel can *always* claim trial counsel should have found and introduced.[2]

Among the supposedly significant mitigating evidence that petitioner claims in the present case is his supposedly high quality family relationships testified to by the *three* women who have borne his children, see Brief for Petitioner 15-17, two of whom he abandoned for others during their pregnancy. See J. A. 553-554, 590. That is not quite as absurd as Justice Thomas's famous example of "mitigating" sociopathy, see *Gra-*

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2. The sweeping mandate of the *Lockett* plurality was wrongly decided as an initial matter. See *id.*, at 623 (White, J., concurring in the judgment); *Walton* v. *Arizona*, 497 U. S. 639, 662 (1990) (Scalia, J., concurring); see also *Graham* v. *Collins*, 506 U. S. 461, 489-492 (1993) (Thomas, J., concurring) (*Lockett* defensible if narrowly construed, but *Penry* expansion is not). The mandate remains by force of *stare decisis*, not original correctness. In an appropriate case, this Court should consider whether the heavy constitutional tax on the system of justice imposed by this decision warrants overruling it.

ham v. *Collins*, 506 U. S. 461, 500 (1993) (concurring opinion), but it is in the same league.

When potential mitigation includes the defendant's entire life, there simply is no case where a second-guesser cannot come up with something new, claim it is significant, and demand an evidentiary hearing. The new evidence need not have been concealed by, or even known to, the prosecution. It is sufficient that the petitioner was not at fault for not producing it in state habeas, *Michael Williams*, 529 U. S., at 432, an elastic standard. Provable facts are not required. Allegations will do. The flimsy evidence of childhood abuse in this case, ultimately rejected by the District Court, see J. A. 802-803, illustrates how easy it is to make the allegation. If the federal court wants to evade § 2254(d), and we know from 12 years of experience that far too many do, see *supra*, at 6, petitioner's proposal would pave an interstate highway to that result.

In order to achieve the result Congress sought—an effective death penalty—§ 2254(d) must be construed to make an evidentiary hearing unnecessary in most capital cases. Petitioner's proposal would do just the opposite. A result contrary to the statute's purpose would be in order only if it were unmistakably compelled by the statutory language. That is not the case here. We will return to what the word "claim" means in Part III, *infra*, but first it is necessary to clarify the nature of the § 2254(d) rule.

II. Subsection 2254(d), like 2244(b), is a modified rule of res judicata.

The central issue in this case is the meaning of "claim" in 28 U. S. C. § 2254(d). That meaning is illuminated by understanding the nature of the rule enacted by that subdivision. The rule is commonly

referred to as a rule of "deference" in the case law, see, *e.g.*, *Bell* v. *Cone*, 543 U. S. 447, 448 (2005) (*per curiam*), just as it was during the floor debate. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945 (1998). However, this convenient shorthand expression is not a substitute for a close examination of the nature of the rule in a case where its exact nature matters.

A. The Language of the Statute.

The place to begin is the language of the statute. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court *shall not be granted* with respect to any claim that was *adjudicated on the merits* in State court proceedings *unless* . . . ." 28 U. S. C. § 2254(d) (emphasis added).

This states the general rule. What follows the "unless" are exceptions to the general rule. This rule is a prohibition against granting relief to a party who has already litigated and lost the same claim. It falls into the same family of rules as the doctrines of res judicata, law of the case, successive petitions, and *Stone* v. *Powell*, 428 U. S. 465 (1976). Rules of this class forbid relitigation of a dispute, with certain exceptions, because of the unfairness to the party who prevailed in the first suit of being forced to fight the same battle over again. "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden); Scheidegger, 98 Colum. L. Rev., at 946.

B. Habeas Corpus and Prior Adjudications.

Far from being a radical innovation, § 2254(d) brings federal habeas for state prisoners back toward the mainstream of Anglo-American jurisprudence. The procedure is still unique, but it is less anomalous than it was before.

The traditional general rule is res judicata. State court judgments have res judicata effect in federal court, even if the federal court disagrees with the result. That has been the rule, if not from day one, at least from year two, the Full Faith and Credit Act of 1790. See Scheidegger, *supra*, 98 Colum. L. Rev., at 912; see also *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947) (correctness of state decision is immaterial); *Allen* v. *McCurry*, 449 U. S. 90, 103 (1980) (no right to relitigate federal right in federal court).

At common law, the habeas court was *not* free to ignore the res judicata effect of other judgments, especially a judgment of conviction. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830), holds unambiguously to the contrary. See Scheidegger, *supra*, 98 Colum. L. Rev., at 928-932 (discussing *Watkins*).

The subsequent history has been discussed many times and need not be repeated here. Suffice it to say that before *Brown* v. *Allen*, 344 U. S. 443 (1953), this Court had developed two discretionary rules of prior adjudication. First, contrary to the common law rule, a judge presented with a successive petition could, but need not, consider the prior denial, even to the point of giving it controlling weight. *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924); see *McCleskey* v. *Zant*, 499 U. S. 467, 481-482 (1991).

Second, *Darr* v. *Burford*, 339 U. S. 200, 215 (1950), overruled on other grounds, *Fay* v. *Noia*, 372 U. S. 391, 435-436 (1963), held that following state review and

denial of certiorari, the habeas court "*may* decline to examine further into the merits *because they have already been decided against the petitioner*. [Footnote citing *Salinger*.]" *Id.*, at 215 (emphasis added). Words can hardly be more clear. *Darr* was a rule of prior adjudication, albeit a flexible, discretionary one.

The *Salinger* rule of successive petitions evolved from one of amorphous discretion to the very lax rule of *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963), to the more structured rule of *McCleskey*, *supra*, 499 U. S., at 493, and finally into the codified rule of 28 U. S. C. § 2244(b). The effect of the prior state adjudication of the claim has followed a similar, though not parallel, evolution. *Brown*, *supra*, effectively reduced the state decision to a mere precedent from another jurisdiction, albeit a particularly pertinent one. See *Wright* v. *West*, 505 U. S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). In § 2254(d), Congress has done with *Darr* just what *McCleskey* and § 2244(b) did with *Salinger*; it has restored the spirit of the pre-1953 discretionary rule but replaced it with a structured and more tightly limited rule.

Throughout American history, the availability of federal habeas for state prisoners has varied as a function of confidence in state courts relative to federal courts. It was forbidden in the beginning, when federal courts were a feared innovation. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. It was expanded during Reconstruction, retracted in the late nineteenth century, see, *e.g.*, *In re Wood*, 140 U. S. 278, 285-286 (1891), expanded again in the 1950s and 1960s during the civil rights struggle, see *Brown*, *supra*; *Fay* v. *Noia*, *supra*, and retracted again in the last quarter of the twentieth century in *Stone* v. *Powell*, 428 U. S. 465 (1976), *Teague* v. *Lane*, 489 U. S. 288 (1989), *Coleman* v. *Thompson*, 501 U. S. 722 (1991), and other cases.

The enactment of a qualified prior adjudication bar is the next logical step in this evolution. It takes us back to the principle that relitigation is the exception and finality of judgments is the rule. See *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) ("not ordinarily re-examine"). It does so based on the recognition that state courts today are far different from what they were in 1953 or 1963, that they warrant more confidence, and that their judgments deserve more respect.

The nature of this rule is plain and found on the surface. Cf. *Ex parte Siebold*, 100 U. S. 371, 393 (1880). It forbids granting a claim previously rejected by a coordinate court, unless an exception applies. Understanding § 2254(d) as a modified rule of res judicata is important to understand what the word "claim" means in the statute. That word has the same meaning that it has in § 2244(b), the same act's other "modified res judicata rule." See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996).

III. The word "claim" has the same meaning in §§ 2254(d) and 2244(b), and ineffective assistance is one "claim."

"[A] basic canon of statutory construction" tells us "that identical terms within an Act have the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 479 (1992). The word "claim," as a noun referring to claims by the habeas petitioner, is used repeatedly in the habeas statutes. See 28 U. S. C. §§ 2244(b)(1), (b)(2), (b)(2)(A), (b)(2)(B)(i), (b)(2)(B)(ii), (b)(4), (d), (d)(1)(D), (d)(2), 2254(d), (e)(2), (e)(2)(A), (e)(2)(B), 2255(f)(4), 2264(a), (a)(3), (b), 2265(a). The word should have the same meaning in all these usages absent a strong indication that Congress intended

different meanings, and no such reason is apparent from the face of the statute or the legislative history. In particular, the word should have the same meaning for §§ 2244(b) and 2254(d) because these are both rules of the same class—preclusion of claims on which the petitioner has received or could have received a decision in a previous proceeding.

A. Successive Petition Cases.

The pre-AEDPA habeas statute and rules used the term "ground" instead of "claim" in the successive petition context. See 28 U. S. C. former § 2244(b) (1994 ed.); Rule 9 of the Rules Governing Section 2254 Cases in the Federal District Courts, 28 U. S. C. foll. § 2254 (1994 ed.). However, the word "claim" was used interchangeably with "ground" by this Court in its thorough examination of the abuse-of-the-writ doctrine in *McCleskey* v. *Zant*, 499 U. S. 467, 471 (1991), and in discussions of the exhaustion rule. See *infra*, at 20. Congress's change from "ground" to "claim" is therefore probably an updating of language rather than a substantive change.

Sanders v. *United States*, 373 U. S. 1, 16 (1963), has a brief discussion of what a "ground" is.

> "By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations."

Sanders must be considered with caution, because it was part of a series of habeas decisions that this Court subsequently abandoned as giving too little weight to the state's interest in finality. See *McCleskey*, 499 U. S., at 506 (Marshall, J., dissenting) ("repudiates a line of judicial decisions . . ."); *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (overruling *Fay* v. *Noia*, 372 U. S. 391 (1963), for giving insufficient weight to finality). Immediately after the passage quoted above, *Sanders* makes the unsupported comment, "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders*, 373 U. S., at 16. That is precisely the kind of tilt in the petitioner's favor that this Court found unjustified in *Coleman*, and this statement should not be considered authoritative.

For its illustration of "ground," however, *Sanders* is not inconsistent with subsequent cases. It is, though, completely inconsistent with petitioner's proposal that a factual difference that merely affects the application of the relevant rule or changes the impression of relevant facts constitutes a new "claim." Psychological ploys and physical coercion would certainly make different impressions and they call for different applications of law to very different facts.

In the interval between *Sanders* and *McCleskey*, there was a significant difference between a second petition presenting a new "ground" and one that reasserted a previous ground with new support. *Molina* v. *Rison*, 886 F. 2d 1124, 1128-1129 (CA9 1989), has a useful survey of court of appeals cases on the meaning of "ground" in this interval. For the convenience of the Court, we have reproduced this survey in the Appendix to this brief.

Molina's survey concludes that "despite the similarity or differences in the factual context of the claim, a ground is successive [the same ground, as opposed to a new one] if the basic thrust or 'gravamen' of the legal claim is the same . . . ." The focus is on the federal constitutional right of the defendant alleged to have been violated and not on the particular facts proffered to support that claim. The cases unequivocally reject arguments equivalent to petitioner's "tied inexorably to the aggregate of operative facts" thesis. *Cunningham* v. *Estelle*, 536 F. 2d 82, 83 (CA5 1976) (*per curiam*), is squarely on point, holding that an ineffective assistance claim "simply . . . varying the factors that he claims demonstrate incompetency" was the same ground as the prior claim.

To accept petitioner's fact-centered thesis, the Court would have to accept either (1) that Congress intended "claim" to have one meaning in § 2244 and a radically different meaning in § 2254, or (2) that Congress intended "claim" to have a radically different meaning in the new § 2244 than "ground" had in the old one, despite the interchangeable use of those terms in this Court's cases. Neither alternative is plausible.

From *McCleskey* to AEDPA, there was little discussion of what was an old ground and what was a new one, because the same exceptions applied to both "successive and abusive claims," as they were known. For example, *Sawyer* v. *Whitley*, 505 U. S. 333, 348-349 (1992), explored the "miscarriage of justice" exception but never specified which category Sawyer's claims fell in, because it did not matter. After AEDPA, the issue has not been extensively litigated because the distinction rarely changes the result in § 2244(b) cases. While paragraph (1) has no exceptions at all, paragraph (2) has exceptions so tight that very few petitioners have even a colorable claim to meet them. Even so, the

distinction is there, and the first step in a § 2244 analysis is to identify which paragraph governs, *i.e.*, whether the "claim" is the same or a new one. See *Gonzalez* v. *Crosby*, 545 U. S. 524, 530 (2005).

Gonzalez defined "claim" as "an asserted federal basis for relief." *Ibid.* This definition tracks *Sanders*' "sufficient legal basis for granting the relief sought" language, which was understood in the cases collected in *Molina* to be inconsistent with a fact-centered approach such as the one petitioner proposes. *Gonzalez* did not, and did not need to, definitively answer whether "a new factual predicate" could make a new claim, see *id.*, at 531, because the main issue in the case was claims versus nonclaims, not new claims versus old claims. The "even assuming" language of this passage seems to express serious doubt of that proposition but reserves resolution for a future case. Petitioner grasps at a straw by relying on *Gonzalez*'s skeptical assumption as if it were authority, but he implicitly agrees that "claim" has the same meaning in § 2254(d) that it has in § 2244(b). See Brief for Petitioner 29.

Only a few post-AEDPA successive petition cases in the courts of appeals have addressed the definition of a "claim" in distinguishing new claims from repeated claims. Those few have understood "claim" in a much broader sense than petitioner proposes. *United States* v. *Allen*, 157 F. 3d 661 (CA9 1998), was a second § 2255 petition by a federal prisoner. Allen repeated the allegations of attorney ineffectiveness from the first petition and added significant new ones. See *id.*, at 664. The court held this to be the same ground, applying the "thrust or gravamen" approach of *Molina*, *supra*, and following *Cunningham* v. *Estelle*, *supra*. *Ibid.*

Babbitt v. *Woodford*, 177 F. 3d 744 (CA9 1999) (*per curiam*), involved a motion to file a second federal petition by a state prisoner. In the first petition, he had

alleged ineffective assistance based on failure to present PTSD evidence but now he had newly discovered evidence of trial counsel's alcohol abuse. *Id.*, at 746. Notwithstanding the completely different factual basis, the court held it was the same claim, following *Allen*, and dismissed under § 2244(b)(1). *Ibid.*

The Seventh Circuit has reached a similar conclusion, at least with regard to ineffective assistance claims. In *Brannigan* v. *United States*, 249 F. 3d 584, 587-588 (CA7 2001), the court noted that it was tempting to borrow the answer from civil claim-preclusion law but concluded that could not be right, because then every collateral attack on a criminal judgment would only have one "claim" and all successive claims would be precluded. *Id.*, at 587. *Brannigan* goes on to conclude that all challenges to a single step in the case are one claim regardless of legal theory, *id.*, at 588, but that conclusion cannot be squared with a long line of authority from *Sanders* to *Gray* v. *Netherland*, 518 U. S. 152, 165 (1996). However, *Brannigan* is consistent with *Babbitt* that ineffective assistance is a single claim, although the statement is arguably dictum because *Brannigan* was not an ineffective assistance case. 249 F. 3d, at 589.

A second opinion of the Seventh Circuit, also by Judge Easterbrook, directly addressed a successive ineffective assistance claim. In *Peoples* v. *United States*, 403 F. 3d 844, 846 (CA7 2005), the petitioner had been before the court three times, and each time he had alleged ineffective assistance of counsel. The first two times the Seventh Circuit resolved the claim on the merits, and "that is enough (if not once more than enough), and we decline to revisit the subject." *Ibid.*

> "Peoples presented ineffective-assistance arguments in his two prior appeals. That ground was resolved adversely to him on the merits, twice.

> Although Peoples now wants to present new instances of supposed shortcomings, ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief." *Id.*, at 847-848, citing *Bell* v. *Cone*, 535 U. S. 685, 697 (2002), and *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984).[3]

Petitioner contends that the rule that counsel's work must be considered as a whole requires that a claim be considered a new claim when one more significant dollop of evidence is added to the petitioner's side of the scale. See Brief for Petitioner 39-40. He has it precisely backwards, according to *Peoples*.

B. Exhaustion Cases.

Petitioner relies on a pre-AEDPA exhaustion case, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), for his definition of "claim," see Brief for Petitioner 29-30, but he places more weight on a negative inference than it will bear. *Hillery* was a carefully limited decision that held merely that the new evidence in that case did not so fundamentally alter the claim so as to require a return to state court. See *id.*, at 260. It did not hold that a greater quantum *would* make a new claim. Quite the contrary, "We have never held that presentation of additional facts . . . evades the exhaustion requirement when the prisoner has presented the substance of his

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3. *Peoples* notes in passing that "[d]iscovery of previously withheld evidence also might reopen the subject," citing *United States* v. *Taglia*, 922 F. 2d 413, 418 (CA7 1991). But *Taglia* is a pre-AEDPA case, and the point cited discusses exceptions to rules against relitigating claims, not the definition of "claim."

claim to the state courts." *Id.*, at 257-258, citing *Picard* v. *Connor*, 404 U. S. 270, 278 (1971). And where does *Picard* look for guidance on what is the substance of a claim? To *Sanders*. See *Picard*, *supra*, at 277-278. The word "claim" in the pre-AEDPA exhaustion cases means the same thing as "ground" in the pre-AEDPA successive petition cases.

C. Monroe.

Monroe v. *Angelone*, 323 F. 3d 286, 297-298 (CA4 2003), is, of course, contrary to the understanding of "claim" in the extensive body of case law described above. But the *Monroe* opinion is superficial and concerns itself primarily with the word "deference," which is not in the statute, rather than "claim," which is. *Monroe* makes no effort to reconcile its understanding of the scope of a "claim" in this part of the statute with the usage elsewhere in the same statute. It is oblivious to the body of the pre-AEDPA case law and the light it sheds on Congress's intent. This opinion and other similar opinions are entitled to little weight.

D. Consistency of § 2254(d) and (e).

Petitioner notes correctly that in § 2254(e)(1) "Congress envisioned evidentiary hearings on federal habeas in cases in which state courts have previously ruled on some of the facts upon which a federal petitioner later relies." Brief for Petitioner 32. However, his claim that the fact rebuttal provisions of subsection (e) are rendered "a dead letter" unless the facts can reopen federal claims decided on the merits in state court by relieving them from the operation of subdivision (d), Brief for Petitioner 34, is a non sequitur.

Subdivision (e)(1) applies to any "determination of a factual issue." It is not limited to factual determinations made in the course of deciding the same claim

that the petitioner makes in federal court. Although the exhaustion and procedural default rules, in tandem, *generally* require that the petitioner make the claim to the state courts in time to receive a determination on the merits, that requirement is not remotely close to watertight. A claim that is procedurally defaulted in state court may nonetheless be considered on federal habeas if the federal court finds that the state ground is inadequate, see *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002), or not independent, *Park* v. *California*, 202 F. 3d 1146, 1151 (CA9 2000), cert. denied, 531 U. S. 918 (2000), if the petitioner meets the "cause and prejudice" test, see *Strickler* v. *Greene*, 527 U. S. 263, 289 (1999), or in extremely rare cases if there has been a miscarriage of justice. See *House* v. *Bell*, 547 U. S. 518 (2006).

Even though the federal claim was never made to the state court, the state court may have made factual findings that are relevant to or even dispositive of the federal claim. States often have rules of state law that are closely analogous to federal constitutional rules. If a California trial judge makes a finding under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), that a prosecutor's race-neutral explanation for a peremptory challenge was genuine, that fact would be rebuttably presumed correct in federal court under § 2254(e)(1) in a subsequent claim under *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Section 2254(d) would not bar the *Batson* claim if it was not timely made in state court and therefore not decided on the merits. The procedural default rule would not bar the claim if the petitioner succeeds in getting around that rule, as petitioners in the Ninth Circuit very often do. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216.

Subdivision (e) can also come into play when a petitioner succeeds in establishing one of the exceptions

to subdivision (d) but does not in the same stroke establish an entitlement to relief. In *Woodford* v. *Visciotti*, 537 U. S. 19, 21-22 (2002) (*per curiam*), the Ninth Circuit believed that the California Supreme Court had applied the wrong standard for judging an ineffective assistance claim. The Ninth was mistaken and this Court reversed, *id.*, at 27, but such a case is certainly possible. In that event, the § 2254(d) bar to relief would be lifted, but the petitioner would still have to establish that he is entitled to relief under the correct standard. Any findings of fact made by the state court would still receive the subdivision (e) presumption.

As a final example, facts found by a state court may be relevant to a procedural question before the federal habeas court, as opposed to the merits of a claim. In a course of deciding that a case is procedurally defaulted under state law, a state court may make findings of historical fact regarding what counsel knew, when he knew it, and when he should have known it. See, *e.g.*, *In re Robbins*, 18 Cal. 4th 770, 781, 959 P. 2d 311, 318 (1998). The cause-and-prejudice exception to the federal default rule often involves such factual issues. See, *e.g.*, *Strickler* v. *Greene*, 527 U. S. 263, 284 (1999).

We could provide other examples, but these will more than suffice. Petitioner's claim that his interpretation of subdivision (d) is essential to give meaning to subdivision (e) is completely without merit.

In summary, then, "claim" has a consistent meaning in the current habeas statute, and it is the same as the meaning of "ground" in the prior statute. A habeas petitioner's claim that a particular legal right was violated, entitling him to relief, is one "claim," regardless of how many different facts are alleged to make the case. This was the understanding before AEDPA, and there is no indication Congress intended to change it.

This understanding of § 2254(d) is fully consistent with the rebuttable presumption of factual findings provided in § 2254(e). As applied specifically to the claim in this case, ineffective assistance of counsel is one "claim," at least as to each stage of the trial: guilt and sentencing.

IV. Whether § 2254(d) precludes a grant of relief must be determined on the state court record, and where it does granting an evidentiary hearing is an abuse of discretion.

On one point, the petitioner is correct. The question of whether a claim is barred by 28 U. S. C. § 2254(d) must be considered entirely on the state court record. Brief for Petitioner 33. As to the facts, paragraph (d)(2) is unmistakably clear: "in light of the evidence presented in the state court proceeding." The reasonableness of the state court's application of precedent under paragraph (d)(1) only makes sense if the application is to those same facts.

Schriro v. *Landrigan*, 550 U. S. __, 127 S. Ct. 1933, 1937, 167 L. Ed. 2d 836, 841 (2007), was a case where the District Court denied an evidentiary hearing and the Court of Appeals held that a hearing was mandatory. The case therefore directly addresses only the limit on the court's discretion to deny a hearing, not the limit on the court's discretion to grant one.

Landrigan discusses how AEDPA changed the factors to be considered without directly altering the judge's authority. See *id.*, at 127 S. Ct., at 1939-1940, 167 L. Ed. 2d, at 843-844. The Court then continues, "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*, 127 S. Ct., at 1940, 167 L. Ed. 2d, at 844.

This holding implements AEDPA's purpose of reducing delays in execution. See *ibid.*

The passage emphasizes factual findings that dispose of the claim because that was the situation presented by the case history in *Landrigan*. As a matter of historical fact, Landrigan had forbidden all mitigating evidence, and that fact precluded any possibility of establishing prejudice under *Strickland*. See *id.*, 127 S. Ct., at 1941-1942, 167 L. Ed. 2d, at 846-847. However, the "otherwise precludes" language indicates that the principle is not limited to dispositive facts. A reasonable application of the correct precedent to the facts before the state court also "precludes habeas relief" on that claim. Therefore, the district court is not *required* to hold an evidentiary hearing on a claim if the state court decided that claim on the merits and neither exception applies.

Is a district court *permitted* to hold a hearing on such a claim? There is no reason to hold one. If the claim is precluded by § 2254(d) on the basis of the state record, no facts introduced in federal court can lift that bar. A hearing would be an unnecessary delay and a waste of resources. An unnecessary delay is an unreasonable delay and therefore a violation of the rights of the victims. See 18 U. S. C. § 3771(a)(7), (b)(2)(A), (b)(2)(D).

The question *Landrigan* did not reach is squarely presented in the present case. The District Court held an evidentiary hearing based on a finding that the petitioner had merely a "colorable claim" that the criteria of § 2254(d) were met. App. to Pet. for Cert. 83a-84a; Brief for Respondent 21-22. That was error and an abuse of discretion. The correct procedure is to decide whether the criteria are met or not based solely on the record in state court. If not, the claim should be finally denied at that point. If so, petitioner has cleared

that hurdle and must now establish his claim on the merits, just as before AEDPA. If a hearing is needed for that purpose and not precluded by § 2254(e)(2), the court should hold one.

We will touch only briefly on the issue of procedural adequacy of factual determinations, as we understand that issue will be covered in another *amicus* brief. That issue is not actually presented in the present case. The state habeas court in the present case did not refuse to consider any evidence proffered by the petitioner and did not resolve against him any genuinely disputed issue of material fact. The state court decided that he was not entitled to relief assuming the truth of his factual allegations. See Brief for Respondent 11-12. This is a perfectly proper way to proceed. Federal habeas rules provide for dismissal without an evidentiary at two points in the process. See Rules 4 and 8(a) of the Rules Governing Section 2254 Cases in the Federal District Courts; see also Fed. Rule Civ. Proc. 56(c) ("no genuine issue of material fact and that the movant is entitled to judgment as a matter of law").

Conceivably, there might be a case where a state court acts unreasonably in summarily deciding material factual questions against the petitioner despite a proffer of solid evidence. When and if that case arises, the Court can consider whether § 2254(d)(2) provides relief. This is not that case. The evidence proffered to the state court was weak and insubstantial, see Brief for Respondent 63-64, and the state court's appointment of two attorneys and an investigator far exceeded any constitutional obligation of the state in collateral proceedings. See *Murray* v. *Giarratáno*, 492 U. S. 1, 10 (1989). Congress considered the question of adequate funding for defense counsel on state habeas in capital cases and decided to allow federal review of that adequacy only for the purpose of Chapter 154, not Chapter

153. See 28 U. S. C. § 2265(a)(1)(A). Where Congress has made an express provision for Chapter 154 and has not included similar language in Chapter 153, the courts cannot read it in to Chapter 153. See *Lindh* v. *Murphy*, 521 U. S. 320, 329-330 (1997). The only criteria for review of the state court determination of the merits by the federal court are those stated in the statute.

V. The District Court decided the prejudice issue after *de novo* review and correctly denied the claim on the merits.

Petitioner insists that the District Court in this case decided his ineffective assistance claim under the standard of 28 U. S. C. § 2254(d) rather than applying the rule of *Strickland* v. *Washington*, 466 U. S. 668 (1984) *de novo*. See Brief for Petitioner 17-18. He is mistaken. Although *amicus* CJLF agrees with respondent that the District Court should not have held an evidentiary hearing, a federal court that has sufficient facts before it to deny a claim on the merits without reference to the state court decision *may* do so. That is what the District Court did in this case. Its decision on the prejudice prong of *Strickland* was correct and reached the correct disposition of the case, notwithstanding the errors that preceded it.

A. The Decision in the District Court.

After the evidentiary hearing, District Judge Jones issued an oral opinion from the bench. J. A. 797. In his opinion, Judge Jones reviewed the evidence presented during the hearing and determined that the evidence did not support a finding that Bell had been prejudiced by the errors of his trial counsel. J. A. 803-804.

As explained in Part IV, *supra*, it is an abuse of discretion to hold an evidentiary hearing when the state court has decided the claim on the merits, and a review of that decision on the state court record shows no exception to § 2254(d) applies. In this case, though, the district judge did hold an evidentiary hearing and made "findings of fact and conclusions of law," J. A. 797, based on "my opportunity to observe the witnesses and make judgment of their credibility, as well as my review of all of the evidence presented." J. A. 798. At no point during his oral opinion did Judge Jones mention the § 2254(d) standard. Instead it appears that Judge Jones reviewed Bell's ineffective assistance of counsel claim *de novo*. J. A. 798 ("I am required to 'reweigh the evidence in aggravation against the totality of available mitigation evidence' "). Reweighing is *de novo* determination of the merits.

When the Fourth Circuit reviewed the District Court's denial of habeas relief it noted, "Although the district court's oral order dismissing Bell's petition did not explicitly apply [the § 2254(d)] standard of review, we read the district court's oral order as consonant with its written order." *Bell* v. *Kelly*, 260 Fed. Appx. 599, 604, n. 2 (CA4 2008). The Fourth Circuit reasoned that because the District Court's written order granting the evidentiary hearing had "noted" § 2254(d)'s deference standard, that must be the standard that the District Court applied when it issued its oral opinion denying Bell habeas relief. *Ibid*. This presumption was unjustified.

In *Price* v. *Vincent*, 538 U. S. 634, 639 (2003), this Court chided the Sixth Circuit because it "recited" 28 U. S. C. § 2254(d), but "proceeded to evaluate respondent's [double jeopardy] claim *de novo* rather than through the lens of § 2254(d) . . . ." After rejecting the argument that the Michigan Supreme Court decision

resolved a factual issue rather than a legal one, see *Vincent* v. *Jones*, 292 F. 3d 506, 511 (CA6 2002), the Sixth Circuit proceeded to discuss the case and reach its conclusion with no further reference to the state court decision or the § 2254(d) standard. See *id.*, at 511-512. This Court understood that to be a *de novo* decision. The inference the Fourth Circuit made in the present case is even weaker than the one this Court rejected in *Vincent*. In the present case, the Fourth Circuit drew that inference from a reference in another opinion five months earlier, as opposed to earlier in the same opinion. On the basis of *Vincent* alone, then, the District Court opinion in this case should be understood as a *de novo* opinion on the merits of the *Strickland* claim. But there is an additional reason to understand it that way. Denials are different from grants.

B. Grants, Denials, and § 2254(d).

On its face, § 2254(d) is a limitation on the power to *grant* habeas relief on a claim previously decided by the state court. It says nothing about denying a claim. For the exhaustion rule, Congress has made the distinction explicit. See 28 U. S. C. § 2254(b)(2). Denying a petition on the merits implicates few, if any, of the concerns of respect for state courts, state procedure, and finality that the exhaustion rule, the procedural default rule, and § 2254(d) protect. When a claim is patently meritless and procedural questions are more difficult, a swift denial on the merits may be the most efficient resolution of the case, entirely consistent with the purpose of AEDPA. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997); *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005); *Smith* v. *Texas*, 550 U. S. 297, 127 S. Ct. 1686, 1703-1704, 167 L. Ed. 2d 632, 650-651 (2007) (Alito, J., dissenting).

Weeks v. *Angelone*, 528 U. S. 225 (2000), decided while the meaning of § 2254(d) was still in dispute, illustrates that a claim can be denied on the merits without violating § 2254(d). *Weeks* involved the trial judge's response to a question from the jury. *Id.*, at 227. This Court affirmed the denial of habeas relief by referencing § 2254(d)'s deference standard, but not without first addressing the merits of Weeks' claim. *Id.*, at 237.

In the first six pages of the opinion, this Court examined whether the jury instruction had violated the Constitution. *Id.*, at 231-236. The bulk of this Court's opinion discussed the "adequacy of the jury instructions" and "their sufficiency" with regard to earlier Supreme Court precedent. *Id.*, at 233. The Court held that "[g]iven that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's questions by directing its attention to the precise paragraph of the constitutionally adequate instruction . . . the Constitution [does not] require[] anything more." *Id.*, at 234. This certainly reads like a *de novo* determination of the merits, just as much as the Sixth Circuit opinion in *Vincent*.

In the last full paragraph of *Weeks*, this Court addressed whether § 2254(d) precludes relief. *Id.*, at 237. "For the reasons stated above, it follows *a fortiori* that the adjudication of the Supreme Court of Virginia affirming petitioner's conviction and sentence neither was 'contrary to,' nor involved an 'unreasonable application of,' any of our decisions." *Ibid.*

The "reasons stated above" were the reasons the claim had no merit. In other words, examination on the merits has established that the defendant had no claim, and a correct decision is necessarily reasonable.

In the present case the District Court granted Bell an evidentiary hearing to determine whether his sentence had resulted from a violation of his constitutional rights under "*Strickland*, *Williams*, *Wiggins* and *Rompilla* line of Supreme Court precedent." *Bell* v. *True*, 413 F. Supp. 2d 657, 699 (WD Va. 2006). Before the District Court could have granted Bell habeas corpus relief, § 2254(d) required a determination that one of the exceptions applied. However, no such determination was required for the federal court to deny Bell's habeas petition. The District Court was free to follow the example set by this Court in *Weeks*. There is, therefore, no good reason to interpret the opinion as anything other than what it appears to be on its face—a *de novo* determination that Bell's showing of prejudice falls far short of the *Strickland* threshold for overturning the judgment. As further explained in the Brief of Respondent, the evidence presented in the evidentiary hearing in District Court did not meet the threshold of prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984), and the District Court's *de novo* holding to that effect was correct.

In summary, the state court decision that Bell was not entitled to relief under the standard of *Strickland* as applied to the facts before the state court, assuming controverted facts in petitioner's favor, was reasonable. Subdivision (d) of 28 U. S. C. § 2254 therefore barred federal habeas relief, and the petition should have been denied at that point. Holding an evidentiary hearing was error. However, the decision that followed was nonetheless correct on the merits. The bottom line is that the Court of Appeals decision denying relief on the basis of § 2254(d) and the District Court decision denying relief on the merits are both correct.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

September, 2008

Respectfully submitted,

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APPENDIX

Molina v. Rison, 886 F.2d 1124, 1128-1129 (CA9 1989):

Several cases have applied this rule to a variety of contexts. *See Lonberger v. Marshall*, 808 F.2d 1169, 1174 (6th Cir.) (ground that plea was involuntary because of failure to inform prisoner of nature of charges was not sufficiently different, under Sanders, from ground that plea was involuntary because of failure to inform prisoner of possible double jeopardy violation), *cert. denied*, 481 U.S. 1055, 95 L. Ed. 2d 850, 107 S. Ct. 2195 (1987); *In re Shriner*, 735 F.2d 1236, 1240 (11th Cir. 1984) (where ground of involuntariness of confession has been raised previously and rejected on merits, prisoner could not assert same ground simply by varying facts on which claim was based); *Williams v. United States*, 731 F.2d 138, 141-42 (2d Cir. 1984) (new factual premise for claim of involuntary confession does not present different legal ground under *Sanders*), *cert. denied*, 469 U.S. 1188, 83 L. Ed. 2d 963, 105 S. Ct. 956 (1985); *Cunningham v. Estelle*, 536 F.2d 82, 83 (5th Cir. 1976) (holding that, under *Sanders*, prisoner could not reassert ground of ineffective assistance of counsel "simply by varying the factors that he claims demonstrate incompetency"); *Raulerson v. Wainwright*, 753 F.2d 869, 873 (11th Cir. 1985) (same); *Brown v. Peyton*, 435 F.2d 1352, 1354 (4th Cir. 1970) (ground that plea had been coerced by judge was not sufficiently distinct from ground that plea had been coerced by attorney), *cert. denied*, 406 U.S. 931, 92 S. Ct. 1785, 32 L. Ed. 2d 133 (1972).

Conversely, several cases have held that an applicant can succeed in alleging a different "ground" if the nature of the legal claim is very different from the earlier one, despite the fact that there may be considerable — if indeed not total — overlap in the factual premises on which the two claims are based. *See Magby v. Wawrzaszek*, 741 F.2d 240, 242-43 (9th Cir. 1984)

(ground that confession was involuntary was sufficiently different from simple claim that confession was taken in violation of *Miranda*), *cert. denied*, 490 U.S. 1068, 109 S. Ct. 2070, 104 L. Ed. 2d 635 (1989)[5]; *McCorquodale v. Kemp*, 829 F.2d 1035, 1036-37 (11th Cir.) (per curiam) (challenge, on eighth amendment grounds, to prosecutor's improper closing argument during death penalty case was a sufficiently distinct ground from earlier claim that the same closing argument rendered the trial "fundamentally unfair"), *cert. denied*, 483 U.S. 1055, 108 S. Ct. 32, 97 L. Ed. 2d 819 (1987); *see also Bush v. United States*, 765 F.2d 683, 684 (7th Cir.) (claim that defense counsel had conflict of interest was sufficiently different from earlier claims that defense counsel had been ineffective in various particulars), *cert. denied*, 474 U.S. 1012, 88 L. Ed. 2d 472, 106 S. Ct. 542 (1985).

At the same time, however, several cases have reiterated *Sanders*' statement that a mere shift in the legal arguments supporting a particular ground is not sufficient to create a new ground for relief. *See Sanders*, 373 U.S. at 16; *Williams v. Butler*, 819 F.2d 107, 108 (5th Cir. 1987) (per curiam) (*Rule 9(b)* may not be "evaded" simply by "advanc[ing] the same claim, supported by new arguments thought up since the last time that [the prisoner] advanced it"); *Wilson v. Henderson*, 742 F.2d 741, 743 (2d Cir. 1984) (claim that prisoner's *sixth amendment* rights under *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), were violated by use of statements made to

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5. *Cf. Miller v. Bordenkircher*, 764 F.2d 245, 250 (4th Cir. 1985) (ground that right against self-incrimination had been violated by failure to give *Miranda* warnings was not sufficiently different from earlier claim that right against self-incrimination had been violated by eliciting statements while prisoner was under influence of drugs).

jailhouse informant was not sufficiently different ground from claim that use of such statements violated *sixth amendment* rights under *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980)), *rev'd on other grounds sub nom. Kuhlmann v. Wilson*, 477 U.S. 436, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986).

These cases establish that, despite the similarity or differences in the factual context of the claim, a ground is successive if the basic thrust or "gravamen" of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments. *Raulerson*, 753 F.2d at 873. Thus, whether a particular "new" issue is merely a "new legal argument" rather than a "new legal claim" will depend on whether the new issue is itself a ground for relief, as opposed to being merely a supporting argument or predicate step to a larger, basic claim. *See Sanders*, 373 U.S. at 16 (defining a "ground" as "a sufficient legal basis for granting the relief sought").

AMICUS CURIAE BRIEF

No. 07-1223

FILED
OCT 3 - 2008

In The
Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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STATEMENT OF AMICI CURIAE INTEREST

States have an interest in maintaining the deferential standards afforded to them under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). As such, the States have a significant interest in how this Court interprets those provisions of the AEDPA, such as 28 U.S.C. § 2254, that entitle the States to that deference. In the context of this case, the States have a particular interest in preserving their ability to conduct summary proceedings of post-conviction claims without forfeiting deferential review by federal courts in federal habeas corpus cases. Idaho, and the 30 other States joining this brief, therefore, urge the Court to reject Bell's and his amici's interpretation of 28 U.S.C. § 2254(d).

SUMMARY OF THE ARGUMENT

The AEDPA, and § 2254(d) in particular, significantly limits the scope of federal habeas corpus review of state court proceedings. The deference to which state court decisions are entitled under AEDPA, and pursuant to general principles of federalism and comity, does not disappear simply because the state court decision was the result of summary proceedings instead of an evidentiary hearing on a post-conviction petitioner's claims. State courts can, and frequently do, adjudicate post-conviction claims on the merits without a hearing, and doing so is

consistent with the application of § 2254(d) and the Constitution.

ARGUMENT

Deference Under AEDPA Is Not Conditioned Upon The Existence Of A State Court Evidentiary Hearing Nor Is Deference Eliminated Whenever A Petitioner Decides To Present Evidence In Federal Court Never Presented To The State Court, Despite The Opportunity To Do So

Section 2254(d) of AEDPA provides that a writ of habeas corpus "*shall not* be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim" resulted in a decision that was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." (Emphasis added.) The limitations on habeas relief codified in § 2254(d) and other provisions of AEDPA reflect Congress' desire to advance the principles of comity, finality and federalism. *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Recognizing these principles and the importance of interpreting AEDPA in a manner consistent with "the historic and still vital relation of mutual respect and common purpose existing between States and the federal courts," this Court has "been careful to limit the scope of federal

intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams*, 529 U.S. at 436. The States' interest in the integrity of their collateral proceedings necessarily encompasses an interest in their ability to adjudicate post-conviction claims in a summary fashion. That interest and the principles underlying AEDPA are at stake in this case.

Bell and his amici argue that States are not entitled to deference pursuant to § 2254(d) of AEDPA whenever a federal court "properly receives" new evidence that was not presented to, and therefore not considered by, the state court in adjudicating a petitioner's claim. There are two alternative theories upon which Bell and his amici rely: (1) the States are not entitled to deference under § 2254(d) whenever new evidence is presented in federal court because the presentation of additional evidence results in a "new claim" that was never "adjudicated on the merits" in state court (Pet.'s Brief, pp.22-35); and (2) deciding claims in summary proceedings instead of conducting a full evidentiary hearing in state court deprives a petitioner of a "full and fair" opportunity to have his claims "properly" addressed in state court (*see generally* Briefs of Amici Curiae in support of Petitioner). Both of these theories are inconsistent with the plain language and purpose of AEDPA, this Court's interpretation of AEDPA, and well-established principles limiting issuance of the writ.

A. The Presentation Of "New Evidence" In Federal Habeas Proceedings Does Not Deprive The State Of Deference Under § 2254

Federal courts are barred from granting habeas relief unless the petitioner exhausts the remedies available in state court. 28 U.S.C. § 2254(b). The exhaustion requirement "reflects a policy of federal-state comity," *Picard v. Connor*, 404 U.S. 270, 275 (1971), which requires a petitioner to "'fairly presen[t]' federal claims to the state courts in order to give the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard*, 404 U.S. at 275). "Fair presentation" requires a petitioner to describe both the operative facts and legal theories upon which the federal claim is premised. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). "Fair presentation" means more than a "mere similarity of claims" between the issues raised before the State's highest court and those raised in the federal petition. *Duncan*, 513 U.S. at 366.

If, as Bell contends, the presentation of new evidence transforms a claim into a "new" claim that was never adjudicated on the merits in state court, then the exhaustion requirement is not satisfied, and the federal court cannot grant relief. If, however, the presentation of new evidence in federal court is merely offered to buttress the evidence offered in support of a claim already adjudicated on the merits in state court, a petitioner is not entitled to relief absent a showing that the state court's adjudication

violated § 2254(d). *See Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). This is true regardless of whether the state court conducts an evidentiary hearing because an evidentiary hearing is not necessary to adjudicate a claim on the merits, nor is a hearing warranted when a petitioner fails to offer sufficient evidence in support of his claim that would entitle him to one.

State court proceedings are not a "procedural prelude to lower-federal court review of state supreme-court determinations." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 647 (1998) (SCALIA, J., dissenting.) It is the petitioner's obligation to present all evidence in support of his claim to the state court, whether the State requires him to do so in writing or permits him to do so at an evidentiary hearing. 28 U.S.C. § 2254(d)(2); *Jackson*, 542 U.S. 649. A petitioner cannot fail to do so and then present that evidence for the first time in federal court and avoid application of § 2254(d). *Jackson*, *supra*. "AEDPA does not permit habeas petitioners to engage in [that] sort of sandbagging of state courts." *Miller-El v. Dretke*, 545 U.S. 231 (2005) (THOMAS, J., dissenting).

B. A State Decision Premised On Summary Proceedings Is Entitled To No Less Deference Than One Premised On A Hearing

Like Virginia, it appears virtually every State provides for the summary disposition of post-conviction

claims without a hearing.[1] This does not mean a claim is not "adjudicated on the merits" such that § 2254(d) no longer applies. In some instances, a petitioner may not request a hearing. In other instances, a hearing may be unnecessary because the claim can be resolved on the record before the trial court. It would be absurd to suggest that, in these circumstances, there was no adjudication on the merits simply because there was no state court evidentiary hearing. Indeed, nothing in AEDPA distinguishes between claims

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[1] *See, e.g.*, ALA.R.CRIM.P. 32.7(d); ALASKA R.CRIM.P. 35.1(f); ARK.R.CRIM.P. 37.3; ARIZ.R.CRIM.P. 32.6(c); CAL. PENAL CODE § 1484; COLO.R.CRIM.P. 35(c)(3)(IV); DEL. SUPER.CT.CRIM.R. 61(d) & (h); FLA.R.CRIM.P. 3.850(d); GA.CODE ANN. § 9-14-40, et seq.; HAW.R.P.P. 40(f); IDAHO CODE § 19-4906(b)-(c); ILL. COMP. STAT. 5/122-2.1(a)(2); IND. POST-CONVICTION RULE 1(4)(g); IOWA CODE § 822.6; K.S.A. § 60-1507; KY.R.CRIM.P. 11.42; LA.CODE CRIM.PROC. art. 928-929; ME.R.CRIM.P. 70; MASS.R.CRIM.P. 30(c)(3); MICH.R.CRIM.P. 6.504(B); MINN. STAT. § 590.04; MISS. CODE ANN. § 99-39-11(2); MO.R.CRIM.P. 29.15(h); MONT. CODE ANN. § 46-21-201; NEB. REV. STAT. § 29-3001, *State v. Gray*, 612 N.W.2d 507 (Neb. 2000); NEV. REV. STAT. 34.770; N.J. RULES OF COURT 3:22-9; N.M. R.DIST.CT. R.C.R.P. 5-802E(1); N.Y.CRIM.PRO. LAW § 440.30(d) and (4); N.C. GEN. STAT. §§ 15A-1420(c)(1), (c)(3); N.D. CENT. CODE § 29-32.1-09; OHIO REV. CODE ANN. § 2953.21(5); 22 O.S. § 1089(D)(4), T. 22, Ch. 18, App., Rules 9.7(A)(5), 9.7(E), 3.11(B); OR. REV. STAT. § 138.525; PA.R.CRIM.P. 907(1), 909(B); R.I. GEN. LAWS § 10-9.1-6(b) (1956); *Wood v. State*, 184 S.E.2d 702, 704 (S.C. 1971); TENN. CODE ANN. §§ 40-30-106, 40-30-108; TEX.R.CRIM.P. 11.07; UTAH CODE ANN. § 78B-9-101, et seq., UTAH R.CIV.P. 65C; VT. STAT. ANN. 13, § 7131, et seq., *In re Gould*, 852 A.2d 632 (Vt. 2004), *In re Thompson*, 697 A.2d 1111 (Vt. 1997); WASH. REV. CODE ANN. § 10.73.140; W. VA. CODE ANN. § 53-4A-3(a); WIS. STAT. ANN. § 974.06(3); WYO. STAT. ANN. § 7-14-101, et seq.

resolved on the pleadings, or through summary judgment, and claims disposed of after hearing for purposes of determining whether § 2254(d) applies. Nor is there anything in AEDPA that requires the State to follow a certain procedure in adjudicating the merits of a petitioner's claim. *See Sumner v. Mata*, 449 U.S. 539, 547 (1981) (analyzing the adjudication of a petitioner's claim under § 2254(d) prior to AEDPA and noting the statute did not "specify any procedural requirements that must be satisfied for there to be a 'hearing on the merits of a factual issue,' other than that the habeas applicant and the State or its agents be parties to the state proceeding and that the state-court determination be evidenced by 'a written finding, written opinion, or other reliable and adequate written indicia.'") The only condition to § 2254(d)'s application is adjudication of the claim on the merits.

Contrary to Bell's and his amici's assertions, a state court's ruling in summary proceedings instead of after an evidentiary hearing does not deprive a petitioner of a "full and fair opportunity" to present his evidence, much less require a federal court to ignore § 2254(d) or conduct its own evidentiary hearing.

In Idaho, for example, a post-conviction applicant submits a verified petition alleging facts that would entitle him to relief. Idaho Code §§ 19-4902, 19-4903. The petitioner may attach documents and evidence offered in support of his claim. Id. This procedure affords a petitioner a full and fair opportunity to present the merits of his claim to the state court.

More importantly, though, the adequacy of the state's procedural mechanism for presenting a claim is not part of the § 2254(d) analysis. *See Miller-El v. Cockrell*, 537 U.S. 322, 358-59 (2003) (THOMAS, J., dissenting) (noting that the deference afforded to state court factual determinations pursuant to § 2254(e)(1) cannot be evaded "by attacking the process employed"). A State's post-conviction process simply has no bearing on whether the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established federal law," § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

This Court's opinion in *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842 (2007), relied upon by Petitioner (Pet.'s Brief, p.56), and the Virginia Association of Criminal Defense Lawyers ("VACDL") (VACDL Brief, p.7), does not compel a contrary conclusion. *Panetti* involved a claim in which the petitioner alleged he was not competent to be executed. 127 S.Ct. 2842. The federal court considering Panetti's habeas petition denied relief, concluding that although the state court proceedings in Panetti's case were inadequate for determining competence under this Court's opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), Panetti had failed to show he was incompetent.

On certiorari, this Court, addressing Panetti's *Ford* claim, determined it was "unencumbered by the deference AEDPA normally requires." 127 S.Ct. at

2855. This Court reached that conclusion because the state court's "failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court," *id.*, *i.e.*, because Panetti satisfied his burden under § 2254(d)(1). This result hardly compels the application urged by VACDL – that a federal court may inquire into the adequacy of a state court's factfinding procedures and ignore the provisions of § 2254(d) if it finds those procedures inadequate. (VACDL Brief, p.7.)

Unlike the situation in *Panetti*, which was based upon "the procedures mandated by *Ford*" for determining competency to be executed, there is no clearly established federal law governing the process by which state courts must evaluate post-conviction claims. As such, a state legislature's specification of and a state court's application of any particular procedure cannot be a violation of § 2254(d).

Apparently recognizing this fact, the National Association of Federal Defenders ("NAFD") and the National Association of Criminal Defense Lawyers ("NACDL") resort to relying on the "history of § 2254" and "the Writ's historical relationship with due process" as providing support for the proposition that a federal court may inquire into the adequacy of the state court process and ignore the requirements of § 2254(d) if it determines the "state court proceedings . . . were procedurally unfair." (NAFD/NACDL Brief, p.10.) Specifically, NAFD and NACDL argue that (although AEDPA eliminated any reference to the

adequacy of the state court's process as a means for avoiding deference otherwise afforded by § 2254), Congress, in enacting AEDPA, simply "t[ook] for granted the procedural foundations of a reliable judgment," and intended to reserve the ability of a federal court to condition its deference on whether it found the state court proceedings "procedurally fair." (NAFD/NACDL Brief, pp.10-20.) This argument is contrary to the plain language of the statute and its purpose.

The interpretation of a statute begins "with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citation omitted). Words in a statute are given "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams*, 529 U.S. at 431 (quotations and citations omitted). "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Judicial developments relating to federal habeas relief and the legislative development of § 2254(d) upon which NAFD and NACDL rely may have been persuasive had § 2254(d) never contained a reference to the adequacy of the state court process. This, however, is not the case. The "full and fair" state court hearing requirement was expressly provided for prior to AEDPA and was expressly eliminated when AEDPA was enacted. Congress said what it meant

and meant what it said when it passed the current version of § 2254(d) – a federal court may not grant a writ for a claim adjudicated on the merits in state court unless the state court's judgment violates § 2254(d). Nowhere in the statute does Congress condition this deferential requirement on a federal court's evaluation of the state court proceedings.

This plain reading of § 2254(d) is consistent with the purposes of AEDPA in particular and Congress' ability to restrict the issuance of the writ in general. *Rhines v. Weber*, 544 U.S. 269, 274 (2005) ("The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions."); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam) ("[I]t is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d)"); *Bell v. Cone*, 535 U.S. 685, 693 (2002) ("The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law."). Section 2254 by its plain language requires deference toward the state court regardless of whether the claim was decided in summary proceedings or after an evidentiary hearing.

Further, the absence of a state court evidentiary hearing does not, in and of itself, entitle a petitioner to a federal evidentiary hearing. Rather, § 2254(e)(2) governs evidentiary hearings and "generally prohibits federal habeas courts from granting evidentiary hearings when applicants have failed to develop the factual bases for their claims in state courts" unless the applicant can satisfy the requirements set forth in § 2254(e)(2)(A) *and* (B). *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1939 n.1 (2007). If, however, a petitioner has diligently attempted to develop his claim in state court he will be excused from § 2254(e)(2)'s requirements and the federal court may, in its discretion, conduct an evidentiary hearing. *Williams*, *supra*. While a petitioner's request for a hearing in state court may be relevant to a diligence analysis under § 2254(e)(2), such a request is certainly not conclusive evidence of diligence since it is the petitioner's obligation to allege sufficient facts and evidence that would entitle him to a hearing in the first instance. Similarly, while the failure to hold a hearing in state court may, under some circumstances, have some bearing on assessing a petitioner's diligence and the need for an evidentiary hearing in federal court, the absence of an evidentiary hearing in state court does not, standing alone, require a federal court to conduct an evidentiary hearing.

Even if a federal court decides to conduct a hearing, or expand the record with new evidence, deference under § 2254(d) is not thereby eliminated. The ultimate inquiry, even where new evidence is

presented, remains the same – whether the petitioner can meet the requirements set forth in § 2254(d). As this Court recently explained in *Landrigan*, 127 S.Ct. at 1940, "[b]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." Thus, in deciding whether to conduct an evidentiary hearing, a federal court should first determine whether a petitioner can meet his burden under § 2254(d) because that burden remains even when new evidence is presented. *See id.*, 127 S.Ct. at 1944 ("Even assuming the truth of all the facts Landrigan sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual determination that Landrigan would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2) and the mitigating evidence he seeks to introduce would not have changed the result."); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (conducting a § 2254(d) analysis even though evidence was added to the record in federal habeas).

Because of the policy issues implicated in the issue presented in this case, and the merits as set forth above, the undersigned amici respectfully request this Court to hold that deference under § 2254(d) is not predicated on the existence of an evidentiary hearing in state court nor do the States lose deference under § 2254(d) any time a habeas

petitioner decides to present new evidence in federal court or the federal court decides to conduct an evidentiary hearing.

CONCLUSION

The amici respectfully requests this Court affirm the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

B589

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Bell claimed in state habeas that his trial counsel were constitutionally ineffective at sentencing for not investigating and presenting character witnesses. He presented affidavits of the witnesses in support of his claim. The state habeas court adjudicated Bell's claim on the merits: it assumed the truth of all of Bell's allegations, found that he failed to demonstrate either unreasonable performance or prejudice, and dismissed the claim on the pleadings. Bell presented this same claim to the district court along with several additional allegations of facts about his own background that trial counsel allegedly failed to investigate. The district court announced that Bell had not failed to develop his claim in state court and held an evidentiary hearing at which Bell presented some of his character witnesses. The district court then found that counsel's performance had been unreasonable, but denied relief on the strength of its independent finding that Bell failed to demonstrate prejudice. The Fourth Circuit expressly declined to address the performance issue and it too found that Bell failed to demonstrate prejudice. Given these circumstances:

> Did the Fourth Circuit err when it additionally applied the deferential standard of 28 U.S.C. § 2254(d) to Bell's claim that was (1) predicated on petitioner's factual allegations which the state court assumed were true and "adjudicated on the merits," and (2) supplemented by additional evidence permitted to be heard in an evidentiary hearing in the district court?

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BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Virginia Association of Commonwealth's Attorneys, established in 1939, is a voluntary association of Virginia's 120 independently-elected Commonwealth's Attorneys and approximately 700 Assistant Commonwealth's Attorneys.[1] The Association has among its purposes advancing the efficient and fair administration of the laws of the Commonwealth, and promoting uniformity in methods of procedure in the trials, appeals and subsequent review of criminal cases arising in the courts of the Commonwealth.

Members of the Association are the prosecutors in Virginia state court criminal trials, which this Court properly has recognized is the "main event" in the criminal justice system, "rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

U.S. 72, 90 (1977). The Association is particularly mindful of the unique role of the prosecutor in the criminal justice process. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, Comment 1, Virginia Rules of Professional Conduct.

Members of the Association also will be the attorneys for the Commonwealth if a criminal case returns for a retrial because error has been discovered in direct appeal or post-conviction review. This Court has acknowledged that federal habeas corpus review "entails significant costs" to the states. *Engle v. Isaac*, 456 U.S. 107, 126 (1982). "The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails." *Coleman v. Thompson*, 501 U.S. 722 (1991).

> As Justice Harlan once observed, '[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error, but rather on whether the prisoner can be restored to a useful place in the community.' *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (dissenting opinion).

Coleman, 501 U.S. at 748, *quoting Engle*, 456 U.S. at 127. In capital murder cases, the Commonwealth cannot begin to enforce a presumptively valid final judgment while the lengthy process of collateral review upon collateral review continues with no guarantee of increasing the quality of justice. *See Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("it is far from clear that a second trial 10 years after the first trial would produce a more reliable result").

> One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," prejudice the government and diminish the chances of a reliable criminal adjudication.
>
> Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.'" Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.

McCleskey v. Zant, 499 U.S. 467, 491 (1991) (internal citations omitted).

The Association is aware of the effect that a decision in this case may have on the way criminal trials are conducted in the Commonwealth and how they subsequently are reviewed. It participates here to inform the Court of state procedures to assure the Court that it may have confidence in the reliability of Virginia criminal judgments and the proper and efficient review of the judgments in Virginia's Supreme Court, and to express its concern with the application of federal law in the lower federal courts that has led to this Court's review of Bell's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Edward Bell, a Virginia inmate under sentence of death, presents an issue of federal habeas corpus procedure arising out of the lower federal courts' disposition of an ineffective assistance of counsel claim. The controlling precedent of this Court requires the inmate to demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner alleged that his trial counsel unreasonably failed to investigate or present certain mitigation evidence at his 2001 capital murder sentencing proceeding. The underlying facts concerning the ineffective assistance of

counsel claim are relatively straightforward and can be resolved without unnecessary confusion of issues. Every court that has reviewed Bell's claim has found that he failed to prove prejudice. The Virginia Supreme Court found that Bell failed to prove deficient performance or prejudice (JA 231); the federal district court conducted an evidentiary hearing and disagreed with the state court's finding as to the performance prong, but independently found no prejudice (JA 801-803); the Court of Appeals declined to address the performance prong, reviewed the state court record and the evidence from the federal hearing, and upheld the reasonableness of the Virginia Supreme Court's finding of no prejudice. (Pet. App. 13a-16a).

The failure to demonstrate prejudice ends an ineffective assistance of counsel claim:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697. The lack of prejudice is manifest in this case.

The record of the federal proceedings makes resolution of the federal habeas corpus procedure issue essentially an abstract exercise. Bell's complaint with

the Fourth Circuit rests on assumptions that the district court correctly followed the federal habeas statute in ordering an evidentiary hearing, but improperly relied on the federal rule of deference in denying relief. However, the federal district court improperly adopted an *ad hoc* procedure not authorized by federal law in ordering a hearing and deciding Bell's claim. This Court, accordingly should decline to reach the issue Bell asserts.

The peculiar *ad hoc* procedure employed by the district court in this case – hearing witnesses to determine whether the state court affidavits were true – should not be approved by this Court as an acceptable application of 28 U.S.C. § 2254(d) because it does not apply, or properly dispense with, the reasonableness inquiry of the federal statute. The district court's procedure, the order, the conduct of the hearing and the court's decision describe an independent inquiry into the correctness of the state court's decision, not the reasonableness inquiry of § 2254(d).

I. BELL CANNOT DEMONSTRATE *STRICKLAND* PREJUDICE.

A Virginia jury unanimously found beyond a reasonable doubt that Bell willfully, deliberately and premeditatedly murdered a law enforcement officer for the purpose of interfering with the officer's performance of his official duties. The murder of a police officer is a distinctly serious offense; many states, like Virginia, have deemed it punishable by death. This

Court has acknowledged the strength of public concern for these public servants even as it ruled that states may not impose a *mandatory* death sentence for the murder of a police officer. *Roberts v. Louisiana*, 431 U.S. 633 (1977).[2]

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

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[2] In *Roberts*, the Court noted that 129 officers were killed in the line of duty in 1975. *Id.* at 636 n.3. Department of Justice statistical reports indicate that 575 police officers were killed in the line of duty between 1996 and 2005. *See* United States Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/homicide/leok.htm.

Id. at 636-637. *Roberts* did not purport to establish an exclusive list of mitigating evidence for such murders, but the examples given all can be understood as having some genuine tendency to suggest a reason for a life sentence after a conviction for murdering a police officer in the performance of his duties. Bell never has suggested that he could present mitigation evidence of a comparable quality.

On the night of October 29, 1999, several law enforcement officers came upon Bell and another man engaged in what appeared to be a drug sale. (Pet. App. 183a). Bell fled, and Sergeant Ricky Timbrook gave chase on foot, yelling repeatedly, "Stop running. Police." (Pet. App. 185a). After pursuing Bell along several streets and alleys, Sergeant Timbrook was fatally shot at close range above his right eye as he climbed over a small fence. (Pet. App. 184a-185a). Timbrook had not even unholstered his sidearm. (Pet. App. 184a).

Police officers discovered Bell hiding in a coal bin in a nearby home. Gunshot residue was found on Bell's hands and evidence connected Bell to the murder weapon. (Pet. App. 186a-187a, 200a). Bell had $1800 worth of cocaine on his person. (VJA 2513).

Bell admitted to police that he was present in the area when the police car arrived; he fled and was chased, but did not know who pursued him or why; he heard a shot and hid in the basement where he was found; he denied having a gun. Later, Bell admitted to a jail inmate that he shot Sergeant Timbrook,

discarded the weapon, and broke into a house to hide. (Pet. App. 187a).

In fact, Bell knew Sergeant Timbrook well from at least three prior encounters. Timbrook arrested Bell in 1997 for carrying a concealed weapon. In 1998, Sergeant Timbrook participated in Bell's arrest pursuant to an INS detention order. And in 1999, Timbrook participated in the execution of a search warrant at Bell's home, and in Bell's presence. Bell disliked the officer and told acquaintances that he would like to see Timbrook dead. Bell boasted that he would shoot the officer in the head in a face-to-face encounter because he knew Timbrook wore a bullet-proof vest. (Pet. App. 187a-188a).

Capital murder, a distinct category of homicide in Virginia, is the willful, deliberate and premeditated killing of a person *and* one of 15 gradation factors. In Bell's case it is the willful, deliberate and premeditated murder of a law enforcement officer for the purpose of interfering with the officer's performance of his official duties. Virginia Code § 18.2-31. The facts of Bell's crime certainly were sufficient for a jury to find that Bell committed capital murder.

Bell's conduct in the murder also strongly influenced the capital murder sentencing proceeding. After a finding of guilty of a capital offense, Virginia law requires a separate sentencing proceeding where the Commonwealth must prove one or both of two statutory aggravating circumstances. Virginia Code § 19.2-264.4. Here, the jury unanimously found that the

Commonwealth proved Bell's "dangerousness" beyond a reasonable doubt – "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society." (JA 151). Virginia Code § 19.2-264.4.[3]

Bell chose to murder a police officer. The evidence would have permitted the jury to conclude that Bell was concerned about a felony drug offense conviction, the possibility of deportation, settling his grudge against Sergeant Timbrook, or all of the above. On this record, the jury was entitled to conclude that Bell's choice of the most extreme conduct to deal with his circumstances – murdering Sergeant Timbrook – objectively established his propensity to violence, fully satisfying the statutory requirement.

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[3] Bell erroneously suggests that a lengthy criminal record of convictions of violent crimes is contemplated for a finding of "future dangerousness" under Virginia law. The statute itself directs the sentencer to consider the defendant's prior record or the circumstances of the current offense. Virginia Code § 19.2-264.4. The Virginia Supreme Court also has confirmed that the statutory finding of dangerousness may be based solely on the circumstances of the murder. *See Beck v. Commonwealth*, 484 S.E.2d 898 (Va. 1997). In Bell's case, the Commonwealth established dangerousness based on his prior history and the current offense.

Significantly, both the facts of the current offense and evidence of Bell's history with law enforcement officers and jailors, excluded any pretense that Bell would be a trouble-free prisoner if sentenced to life imprisonment. He was convicted in Jamaica of assault and destruction of property in 1985. More recently in this country, he had possessed and sold illegal drugs; in 1997 he was found by police to have a concealed gun with the serial number obliterated; he had physically assaulted a pregnant girlfriend and threatened another acquaintance with a gun in 1997; and he had threatened employees of the local jail while awaiting trial. In encounters with law enforcement officers in West Virginia in 1999, Bell had been found in possession of .38 caliber ammunition and had used a false name before fleeing from an officer attempting to arrest him. (Pet. App. 188a). This evidence only confirmed Bell's dangerousness.

Bell's murder would be viewed by a jury as exceptionally aggravated because his victim was a police officer. And, by all accounts, Sergeant Timbrook was the very model of a dedicated, professional law-enforcement officer who is a credit to his community. Valued and respected by colleagues for his work, he served his community even beyond his immediate law enforcement responsibilities. (VJA 1683, 1687, 3019, 3031, 3033). Ricky Timbrook and his wife were expecting their first child – a son – at the time of his murder. His family testified at sentencing about the impact of the murder. (JA 120-129).

Bell denied the offense and provided his counsel with no basis to assert any defense, excuse or justification for his conduct. At the time of petitioner's sentencing, his lawyers presented the testimony of Bell's father and a sister to comment briefly on the defendant and his family, mainly to show the jury other people who would be affected by Bell's death. (JA 134-139, 148). At best, this evidence only technically was "mitigation," in that the trial court would have risked error in excluding it. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as *a mitigating factor*, any aspect of a defendant's character or record. . . ."). However, as the prosecutor at trial correctly observed, the defendant actually presented no "mitigation" evidence (JA 141, 143), in the sense of providing an actual opportunity, reason or incentive for a life sentence. Accordingly, counsel argued for a life sentence on other grounds, stressing the security of confinement in prison, the possibility of residual doubt about Bell's guilt, and a general plea that Bell's execution would not help Sergeant Timbrook's family and would impact Bell's innocent family adversely. (JA 144-148). The jury sentenced Bell to death for the capital murder and the maximum sentences for a possession with intent to distribute cocaine and use of a firearm.

Bell's state habeas corpus petition alleged a variety of circumstances in his background that trial counsel allegedly failed to investigate and present at

sentencing. When granted a federal evidentiary hearing, Bell presented only five "mitigation" witnesses. (JA 540-607). The district court believed that four of Bell's friends offered generally "helpful things to say about Bell's character"; characterizing Bell as "loving, decent and hard-working" and a "good father" to his children; one witness, Nicholson, also stated she could have contested prosecution evidence that Bell assaulted another girlfriend. (JA 799-800). Technically, it meets the broad definition of "mitigation," and certainly it would be admissible, but it drains any coherent meaning from the concept to suggest that Bell's habeas "mitigation" has any actual capacity to produce a reasonable probability of a life sentence in the context of this case.

Much like trial counsel's offered "mitigation" evidence, petitioner's flimsy "good character" evidence suggests no tangible reason for leniency and inspires no reasonable hope for a life sentence. This Court has recognized factors that might be considered mitigation evidence for crimes like Bell's, *see Roberts*, 431 U.S. at 636-637, and has identified substantial and compelling evidence in finding prejudice in previous "mitigation" cases. *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 517 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). Bell does not have evidence of comparable quality, as he readily admits. (Pet. Brief at 47-48).

As weak as it is, this Court also cannot reasonably assume that Bell's evidence would have been even marginally positive. The Virginia Supreme Court

correctly observed that Bell's proffered evidence could serve cross purposes; it cannot be sanitized so that it is entirely beneficial. (JA 229). These witnesses risked at least as much harm to Bell's cause as the limited bit of good they could do. Testimony from Bell's ex-wife and ex-girlfriends about their beliefs that Bell was hard-working, decent, and loving would not escape challenge from the experienced prosecutor who had just detailed evidence of Bell's bad character. Such testimony invites cross-examination to explore the witnesses' knowledge of other, more damaging aspects of the defendant's past conduct, and provides an easy opportunity to repeat and reinforce the aggravating nature of the defendant's conduct. The witnesses are subject to cross-examination on their obvious interest and bias; they still have affection for Bell and the children Bell fathered, but did not support; they have knowledge of Bell's drug use; and they have knowledge of Bell's assaultive behavior. Finding any inherent "mitigation" value in these witnesses that would survive even routine cross-examination is entirely speculative.

Bell's weak "mitigation" cannot be improved by watering down the *Strickland* prejudice standard and claiming that he merely needs to show that "one juror" probably would have voted for a life sentence if trial counsel had presented different evidence.[4]

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[4] Virginia's capital sentencing statute directs the trial court to impose a life sentence in a capital case if the jury is unable to agree unanimously on a sentence. Virginia Code § 19.2-264.4(E).

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Strickland, however, commands that a reviewing court make an objective assessment of prejudice and explicitly prohibits finding prejudice even on the basis of *known* proclivities of a decisionmaker. *Strickland*, 466 U.S. at 695 (a finding of prejudice does not "depend upon the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"). It hardly improves an objective prejudice standard to bind it to imagined juror propensities. For purposes of a prejudice analysis the only "juror" that may be identified is the presumptively reasonable, conscientious, and impartial juror who faithfully applies the law given by the court to the facts of the case, just like his or her fellow jurors, *not* "one juror" arbitrarily assumed to have a tendency to view the defendant's case favorably. *See Strickland*, 466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, 'nullification,' and the like.").

In Virginia, as elsewhere, individual jurors drawn from the community are questioned and found qualified to hear a criminal case. They come to their

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From this, Virginia Association of Criminal Defense Lawyers (VACDL) appears to assume that Bell's *Strickland* prejudice burden applies less stringently. (VACDL Br. at 2, 20). In the circumstance of a jury unable to agree on sentence, some factual basis exists to suggest that at least one juror had a differing opinion on the appropriate punishment on the facts of that case. Bell's jury was unanimous in returning a death sentence.

duty and deliberate together as a single jury that renders a single verdict to which each juror has sworn his or her individual assent. That is the only decisionmaker in a Virginia capital murder case to be considered in a *Strickland* prejudice inquiry.

II. THE DISTRICT COURT ADOPTED AN ERRONEOUS PERFORMANCE STANDARD.

In conducting the *Strickland* inquiry, the district court adopted a hindsight view of the circumstances presented to trial counsel. This was error. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *See Strickland*, 466 U.S. at 689.

The district court's dissatisfaction with trial counsel's efforts was based on an undisguised after-the-fact assessment of the case. The court discounted trial counsel's concerns about the risks of the "good character" evidence by stressing repeatedly that the verdict could not have been worse than a death sentence. (JA 793: "How could it have been any worse?"; "Could it have been any worse?").[5] The court concluded that counsel's concern about "double-edged

[5] The district court ruled from the bench at the conclusion of the evidentiary hearing and no subsequent opinion addressed the court's findings.

sword" evidence was unfounded because it already was before the jury in the prosecution's case. (JA 802). Trial counsel, however, lacked the benefit of the district court's after-the-fact certainty of a death sentence and reasonably was concerned about damaging evidence coming before the jury from the defendant's own witnesses.

The district court also substituted a performance standard that itself is contrary to this Court's precedent by embracing an apparent bright-line rule that would require some mitigating evidence to be offered as a matter of law, even if it could not affect the verdict. The court faulted trial counsel for presenting "zero mitigation" and failing to present evidence the court conceded would not have made any difference in the verdict:

> While I find that counsel should have done more in presenting this mitigating evidence, I have to say that based on all of the evidence presented, I believe that the jury would have arrived at the same verdict of death even had this mitigating evidence been presented.

(JA 803). The district court's methodology simply requires finding that a death sentence exists and that trial counsel put on no mitigation evidence, and the district court made that finding. If that now is the standard to determine performance, then trial counsel indeed performed deficiently. That standard, however, was an erroneous application of *Strickland*. *See Wiggins*, 539 U.S. at 533 ("*Strickland* does not

require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case").

III. VIRGINIA PROVIDES ABUNDANT OPPORTUNITIES FOR THE LITIGATION OF CONSTITUTIONAL CLAIMS.

At every step of the proceedings in Virginia's courts, every participant – be it prosecutor, trial judge, defense attorney, juror, or Supreme Court Justice – is fully aware of their weighty responsibilities. A death penalty case does not suddenly for the first time become important or serious when the convicted inmate begins federal collateral review, and it is absurd to contend that federal habeas corpus review presents the first opportunity for a Virginia inmate to obtain review of claims of constitutional error in his state court trial. The Virginia General Assembly has mandated safeguards and extended opportunities for condemned inmates in the trial, appeal and post-conviction review of a capital murder case.

The trial court was obligated to appoint "one or more" attorneys to represent Bell from a list of qualified capital case attorneys. Virginia Code § 19.2-163.7 (1995). At the time of Bell's trial, the Virginia General Assembly required the Public Defender Commission

and the Virginia State Bar to adopt standards for the appointment of counsel in capital cases, "which take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation." Virginia Code § 19.2-163.8(A) (1991). Further, the Public Defender Commission was made responsible for maintaining a list of qualified attorneys and inclusion on this list required an additional determination of "all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation," Virginia Code § 19.2-163.8(B) (1991). The statutory requirements were followed in Bell's case.

In capital murder cases there are no caps on the fees paid court-appointed counsel and court-appointed expert fee caps also may be disregarded. Virginia Code § 19.2-175. Upon motion of defense counsel and a finding of indigence a defendant charged with capital murder is entitled to a forensic mental health evaluation by one or more mental health experts. No *Ake* showing is required. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). (mental health expert assistance to be made available where defendant makes threshold

showing that mental condition is likely to be a significant factor at trial). The mental health expert is "to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense." Virginia Code § 19.2-264.3:1(C).[6]

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[6] Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the General Assembly enacted Virginia Code § 19.2-264.3:1.2 (2003), now also providing a capital murder defendant with the services of one or more qualified mental health experts to assess whether or not he is mentally retarded and to assist the defense in the preparation and presentation of information concerning mental retardation. Effective 2005, any criminal defendant may obtain the services of the Virginia Department of Forensic Science to conduct a scientific investigation of evidence relevant to his case simply by making a good faith request that is heard *ex parte* by the trial court. Virginia Code § 9.1-1104. Virginia law requires that all indigent defendants be provided with "the basic tools of an adequate defense." *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996), *quoting, Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). "[A]n indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the

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Appellate counsel for the convicted defendant also must be appointed from the qualified attorney list. All death sentences receive automatic review in the Virginia Supreme Court; no notice of appeal is necessary. Trial transcripts must be prepared "as expeditiously as practicable" and the record promptly filed with the Supreme Court. In addition to review of alleged trial errors raised by the defendant, the Virginia Supreme Court determines in every case whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The Supreme Court may affirm the death sentence, remand the case for a new sentencing proceeding, or commute the sentence to life imprisonment. By law, the Supreme Court must give priority to the review of death penalty appeals over other cases on its docket. Virginia Code § 17.1-313.

Within 30 days after affirmance of a death sentence on direct appeal, the trial court is to appoint counsel to represent the convicted capital murder defendant for a state habeas corpus petition; his

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subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," *Ake*, 470 U.S. at 82-83, and that he will be prejudiced by the lack of expert assistance. *Id.* at 83. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Husske*, 476 S.E.2d at 925.

petition must be filed no later than 60 days after this Court has denied certiorari or completed review on direct appeal. Virginia Code § 19.2-163.7. State habeas counsel also must be appointed from the list of qualified capital case attorneys. *Id.* In the event that appointment of habeas counsel is not timely, the inmate's habeas filing date is extended by operation of law to guarantee counsel no less than 120 days after appointment to prepare and file a habeas corpus petition, as was done in Bell's case. Virginia Code § 8.01-654.1 (1998).[7]

The Virginia Supreme Court has exclusive jurisdiction to consider habeas corpus petitions in death penalty cases. Virginia Code § 8.01-654(C)(1); § 17.1-310.[8] The Supreme Court is directed by law to "give priority to the consideration and disposition of petitions for writs of habeas corpus filed by prisoners held under sentence of death." Virginia Code § 17.1-313.

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[7] Virginia law also provides any convicted defendant with an additional opportunity for post-conviction review of previously unavailable DNA evidence in a "Writ of Actual Innocence," *see* Virginia Code § 19.2-327.1 (2005), or review of newly discovered evidence in a "Writ of Actual Evidence Based on Non-biological Evidence," Virginia Code § 19.2-327.10 (2004).

[8] In all other criminal cases the Supreme Court and the trial court have concurrent jurisdiction to consider petitions for habeas corpus relief; the Supreme Court may return a writ to the circuit court for an evidentiary hearing if necessary. The Supreme Court has exclusive appellate jurisdiction for all circuit court habeas petitions. Virginia's intermediate appellate court has no original or appellate jurisdiction in habeas corpus cases challenging criminal convictions.

IV. THE VIRGINIA SUPREME COURT PROPERLY ADJUDICATED BELL'S CLAIM ON THE MERITS.

Virginia's statutory post-conviction procedures provide an inmate the opportunity for full and fair adjudication of state habeas corpus claims as a matter of law and as is shown in Bell's case.[9] The Virginia Supreme Court properly adjudicated the merits of Bell's claim on the record according to Virginia law, accepting his facts as pleaded and finding them insufficient for relief. "In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record." Virginia Code § 8.01-654(B)(4). The state procedure for determining claims on the record is not defective or otherwise suspect. It is not noticeably different than that employed by a federal district court. *Schriro v. Landrigan*, 127 S.Ct.

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[9] Virginia has not created state processes to be a part of federal habeas review. States are not required by the Federal Constitution to create and maintain any system of post-conviction review. *See Lackawanna County District Attorney v. Cross*, 532 U.S. 394, 402 (2001) (no constitutional mandate that states create mechanism for direct appeal or post-conviction review); *Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Murray v. Giarratano*, 492 U.S. 1, 13 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). Virginia has chosen to establish its own comprehensive procedures for direct and collateral review of its own criminal judgments. Having made that choice, Virginia is not compelled to make its post-conviction procedures conform to a federal model. *Smith*, 528 U.S. at 275.

1933, 1940 (2007) (if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

Bell was not improperly denied a hearing or denied an opportunity to further develop his claim. Bell's habeas claims were "developed" at the time he filed the state petition because Bell was required by Virginia law to include all of his factual allegations in his state habeas filing:

> *Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing* and such petition shall enumerate all previous applications and their disposition.

Virginia Code § 8.01-654(B)(2) (emphasis added). "The statutory language could not be more explicit; *it means what it says*. At the time of filing the initial petition, the prisoner must include 'all' claims the facts of which are known to the prisoner." *Dorsey v. Angelone*, 544 S.E.2d 350, 352 (Va. 2001) (emphasis added). *See Lovitt v. Warden*, 585 S.E.2d 801, 817 n.4 (Va. 2003) ("We do not consider Lovitt's additional contention [raised after an evidentiary hearing]. Lovitt failed to make this allegation in his habeas petition. *See* Code § 8.01-654(B)(2)"); *Winston v. Warden of Sussex I State Prison*, 07 Va. S.Ct. UNP 052501, at 8 (Va. 2007) ("[A]s the facts which support this allegation were known to petitioner at the time he filed his oversized petition on December 2, 2005, Code § 8.01-654(B)(2) also bars our consideration of

this portion of claim (III)"). In Virginia, as in federal court, an inmate cannot make bare claims with the expectation of additional proceedings to flesh them out. *See Jones v. Polk*, 401 F.3d 257, 269 (4th Cir. 2005) (an evidentiary hearing is an instrument to test the truth of facts already alleged in the habeas petition).

Amicus VACDL suggests that Virginia law unfairly "restricts" the development of facts because the Supreme Court has exclusive jurisdiction over death penalty habeas corpus cases. The Commonwealth's highest court is not less knowledgeable than state trial courts about the Constitution, the writ of habeas corpus, ineffective assistance of counsel claims, or death penalty law.[10] Virginia law guarantees that the Virginia Supreme Court thoroughly reviews *every* Virginia death penalty case, on direct appeal and during state habeas review.

Prior to the 1995 reforms in Virginia's habeas corpus law, inmates challenging death sentences initiated state habeas petitions in the trial court and subsequently appealed to the Virginia Supreme Court. 1995 Va. ACTS ch. 503. The process allowed too many unnecessary habeas hearings in the trial courts, causing inconsistent applications of law and

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[10] The Virginia Supreme Court's experience in habeas cases far exceeds that of any trial court. It considers hundreds of habeas corpus filings annually pursuant to its original and appellate jurisdiction. *See* "Virginia Supreme Court Case Type Filings," http://www.courts.state.va.us/csi/scv.html.

unnecessary delay. The General Assembly adopted a procedure for capital murder cases that eliminated the automatic two-stage state habeas corpus procedure.

The Virginia Supreme Court now has exclusive original jurisdiction for death penalty habeas cases. *See* Virginia Code § 8.01-654(C)(1); § 17-97. It receives the petition initially instead of on appeal, and it decides if a hearing is necessary or if the claims may be resolved on the record. When the Supreme Court identifies claims presenting disputed factual issues that cannot be resolved on the record, it refers the claims to the trial court for a hearing. Virginia Code § 8.01-654(C)(1) & (2). By statute, the circuit court must conduct a hearing and report recommended findings of fact and conclusions of law on a timetable that avoids unnecessary delays. Virginia Code § 8.01-654(C)(3). The Virginia Supreme Court preserves the trial court's traditional opportunity to decide disputed factual disputes and make credibility determinations by treating factual findings as binding if supported by evidence. *See Lovitt v. Warden*, 585 S.E.2d 801, 808 (Va. 2003).

V. THE DISTRICT COURT IMPROPERLY FAILED TO APPLY 28 U.S.C. § 2254(d).

In the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Congress established a general rule requiring federal courts to defer to the reasonable merits decisions of state courts. The structure of

28 U.S.C. § 2254(d) sets out a decisional checklist that encourages efficient resolution of habeas claims. No part of § 2254(d) involves the need for an evidentiary hearing.

The statutory general rule is stated in the clearest terms: the writ "shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings." § 2254(d). Whether the claim was decided in state court on the merits is a matter of record. The exceptions to the general rule all are determined on the state court record. Whether the inmate can demonstrate that the state court decision is contrary to, or an unreasonable application of, clearly established federal law also is evaluated on the record § 2254(d)(1); the district court determines the controlling precedent of this Court and assesses the reasonableness of the state court's application of law to an already established set of facts. Concerning the reasonableness of the state court's factual determinations, the federal habeas court looks to the state court record to identify the state court "decision," what facts are determined, and the "evidence presented in the state court proceeding." § 2254(d)(2). No need or opportunity for a federal evidentiary hearing even is suggested within § 2254(d).

The district court's puzzling order granting an evidentiary hearing cannot be ratified as an acceptable application of § 2254(d). The district court found a "colorable claim" that the Virginia Supreme Court's decision was an unreasonable determination of the

facts and an unreasonable application of controlling precedent. It is not clear what the district court meant by a "colorable claim" of unreasonableness, but the court clearly did not actually find unreasonableness. The court expressly declined to make a "final ruling" on the issue until an evidentiary hearing was held. The stated purpose of the evidentiary hearing was to have "the relevant issues . . . developed more fully."

An evidentiary hearing for an "unreasonableness" assessment cannot be reconciled with the record review contemplated by § 2254(d).[11] By its specific terms, § 2254(d) directed the district court to consider the "decision" of the state court and "the evidence presented in the state court proceeding." All of these matters already were before the federal court as a part of a complete state court record. Extrinsic evidence was unnecessary to establish the record to be reviewed. More importantly, because Congress explicitly limited the § 2254(d) inquiry to "the evidence presented in the state court proceeding," extrinsic evidence different than what the Virginia Supreme Court considered was not permitted.

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[11] Circumstances where the federal court lacks an accurate state court record detailing the "evidence presented in the state court proceeding" might call for different treatment. *See* § 2254(f) ("If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.").

The district court's order recites the factual allegations petitioner presented in his state habeas corpus petition. There were no facts to be "developed more fully." Section 2254(d) directs that the evidence presented to the state court is the totality of the evidence to be considered in the reasonableness inquiry, not a starting point for further development.

A hearing to develop facts "more fully" suggests an independent inquiry into whether the facts exist or are "true," or a design to allow a petitioner to further expand the factual basis of his claims. If the district court had intended the grant of an evidentiary hearing to signal permission for Bell to develop new facts never presented to the state court, it would have committed clear error. Again, § 2254(d) directs the federal court to look at the evidence presented in state court. And this Court has ruled that the federal habeas petitioner is limited to the factual basis of claims decided in state court absent a showing of "cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure." *Keeney v. Tamayo Reyes*, 504 U.S. 1, 11 (1992).

In fairness to the district court, its order did not necessarily imply a determination that Bell was free to present new facts he never raised in state court. The district court's comment regarding § 2254(e)(2) seems to say nothing more than that Bell did not fail to develop in state court the facts that Bell had developed in state court. The discussion of Bell's claim largely tracked the factual allegations of the

state court affidavits. The district court contemporaneously declined to address the Warden's objection to Bell's inclusion of defaulted facts, characterizing those items as "not critical to my decision on this claim." Petitioner already had assured the district court that he was presenting exactly the same claim that the Virginia Supreme Court decided. At the conclusion of the hearing, the district court's statements centered almost entirely on his satisfaction that the fact witnesses' federal testimony followed what their state court affidavits asserted. The district court apparently wanted to hear what the fact witnesses had to say.

The district court's order recited the belief that Bell alleged "facts that, if true," would entitle petitioner to relief, but a hearing to determine which facts were true was unnecessary. The Virginia Supreme Court's order sets out petitioner's alleged facts, accepting them as established facts and "true"; the state court's order did not suggest that any of petitioner's facts were not "true"; the Virginia Supreme Court simply ruled that Bell's facts as pleaded did not merit relief.[12] (JA 228-231). The district court did not

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[12] The record does not support petitioner's argument that the state court "resolved important factual disputes against him" by concluding that Bell's "impeachment" witnesses also could be impeached and that defense attorneys reasonably may choose to avoid cross purpose evidence. (Pet. Brief at 58). The state court was entitled to notice other facts in the record, and settled principles of law, in deciding the legal significance of Bell's alleged facts that the Court had accepted as established.

need a hearing to accept Bell's state court facts as "true."

Most disturbing, however, is the district court's reliance on *Townsend v. Sain*, 372 U.S. 293, 313 (1963), as guaranteeing Bell a hearing because "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." The Virginia Supreme Court's "fact-finding procedure" in habeas corpus cases provides a "full and fair" opportunity to present constitutional claims and have them decided on the merits precisely as such claims are decided in federal court. In Bell's case, the Virginia Supreme Court's procedure in adjudicating the merits of petitioner's claim consisted of accepting Bell's factual allegations as pled. A federal court examination of the adequacy of a state court's procedures to provide a "full and fair hearing" is no longer the touchstone for federal evidentiary hearing. AEDPA "changed the standards for granting federal habeas relief." *Landrigan*, 127 S.Ct. at 1939. Section 2254(d) directs the federal court to first determine the *reasonableness* of the state court *decision*.

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. . . . *Because the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those*

> *standards in deciding whether an evidentiary hearing is appropriate.*

Id. at 1940. (Emphasis added). The district court's decision to hold an evidentiary hearing *first*, in order to resolve the reasonableness inquiry later, inappropriately reversed the correct process.

Taking the district court's order and subsequent hearing together, this Court cannot endorse the decision to grant an evidentiary hearing as an appropriate application of § 2254(d). The district court had a hearing to decide if the state court correctly decided the claims. It conducted a *de novo* review of some of the facts presented in state court and independently decided the performance and prejudice inquiry of *Strickland* differently than had the Virginia Supreme Court, without ever finding the state court's decision "unreasonable." It did not apply § 2254(d) as Congress directed or consistent with this Court's understanding of AEDPA.

Petitioner obtained an undeserved windfall in the district court. He had an evidentiary hearing on a claim that he said was exactly the same as his unsuccessful state court claim, without any ruling that the state court's decision was unreasonable, and *de novo* review of the *Strickland* claim that applied an erroneous deficient performance standard. Nevertheless relief was denied because he could not demonstrate prejudice. The Fourth Circuit had the opportunity to correct the district court's errors, but instead decided the case on the alternate basis of no *Strickland*

prejudice, thoroughly reviewing the entire state and federal court evidentiary record, and upholding the state court's "no prejudice" determination under § 2254(d). That decision would have been unassailable had the district court properly applied § 2254(d). The result of these combined decisions is that petitioner frames an issue in this Court that assumes, among other things, that the lower courts applied § 2254(d)'s deferential review incorrectly after Bell properly received an evidentiary hearing on a claim that is so significantly different from the state court allegations as to constitute a new claim.

Petitioner has asked the Court to decide in this case what standard of review the district court and Fourth Circuit ought to have applied to decide his claim after the district court properly ordered an evidentiary hearing. The underlying premise for his argument is absent because the hearing was not properly ordered. The *ad hoc* procedure followed by the district court is not a proper application of § 2254(d). Petitioner has left this Court with an abstract question of law, divorced from the facts of his case, that should not be decided in his favor.

Petitioner cannot demonstrate *Strickland* prejudice for his claim under any available standard of review. The Virginia Supreme Court reasonably found no prejudice. The district court independently agreed after its own *de novo* review. Bell's failure to demonstrate prejudice is dispositive of his underlying claim. The Fourth Circuit correctly upheld the reasonable determination of the state court on the issue of

prejudice, even granting petitioner the benefit of additional facts developed in federal court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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